

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

76

BRIEF FOR APPELLEE

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

MICHAEL L. STOVALL,

No. 18,403

APPELLANT

v.

UNITED STATES OF AMERICA,

APPELLEE

LESLIE R. YOUNG,

No. 18,404

APPELLANT

v.

UNITED STATES OF AMERICA,

APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

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United States Court of Appeals
for the District of Columbia Circuit

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QUESTIONS PRESENTED

In the opinion of appellee the following questions are presented:

1. Did the District Court err in denying appellant Young's

motion to suppress, where:

- a. Appellant Young was arrested after he and a juvenile companion entered the lobby of a motel at 3:40 a.m. without luggage and with their right hands in their right coat pockets and a police officer who happened to be in the lobby observed their entrance and believed that they were carrying guns, and further after the officer asked them what they were doing, appellant Young unzipped his trousers and asked for the rest room. The search of appellant Young revealed that he was in fact carrying a gun.

2. Did the District Court abuse his discretion in excluding

photographic slides of the motel where:

- a. It was shown that the slides were posed pictures containing defense counsel standing in a position that appellants believed was the position occupied by the police officer on the morning of the crime.
- b. The slides did not accurately portray the scene of the crime as it existed when the crime occurred.

3. Did the District Court err in denying appellants' motion for a judgment of acquittal where the evidence clearly presented a factual determination for the jury.

I N D E X

	<u>P a g e</u>
Counterstatement of the case -----	1
Government's evidence -----	2
Evidence presented by appellants -----	5
Statutes involved -----	7
Summary of argument -----	8
Argument:	
I. The District Court properly denied appellant Young's motion to suppress -----	10
II. The District Court did not err in refusing to admit certain photographic slides into evidence---	14
III. The District Court properly denied appellants' motion for judgment of acquittal -----	17
A. The District Court properly denied appellant Young's motion for a judgment of acquittal ---	18
B. The District Court properly denied appellant Stovall's motion for a judgment of acquittal--	21
Conclusion-----	24

TABLE OF CASES

<u>Bates v. United States</u> , 95 U.S. App. D.C. 57, 219 F.2d 30, <u>cert. denied</u> , 347 U.S. 961 (1955)-----	17
<u>Bell v. United States</u> , 102 U.S. App. D.C. 383, 254 F.2d 82 (1958), <u>cert. denied</u> , 358 U.S. 885 -----	11
<u>Bell v. United States</u> , 108 U.S. App. D.C. 169, 280 F.2d 717 (1960)-----	22
<u>Brennan v. United States</u> , 240 F.2d 253 (8th Cir. 1957), <u>cert. denied</u> , 353 U.S. 931 -----	19
<u>Brinigar v. United States</u> , 338 U.S. 160, 175 (1959)-----	10
<u>Buie v. State</u> , 217 Miss. 695, 64 S.2d 897 (1953)-----	14

I N D E X (Continued)

	<u>P a g e</u>
<u>Carrol v. United States</u> , 267 U.S. 132 (1925)-----	10
<u>Chicago G.W.R. Co. v. Robinson</u> , 101 F.2d 994 (8th Cir. 1939), cert. denied, 307 U.S. 640 -----	14
<u>Cooper v. United States</u> , 94 U.S. App. D.C. 343, 218 F.2d 39 (1954)-----	17
<u>Coupe v. United States</u> , 72 App. D.C. 86, 89, 113 F.2d 145, cert. denied, 310 U.S. 651 (19) -----	15
<u>Cummings v. United States</u> , 289 F.2d 904 (10th Cir. 1961), cert. denied, 368 U.S. 850-----	19
<u>Curley v. United States</u> , 81 U.S. App. D.C. 389, 392, 160 F.2d 229 cert. denied, 331 U.S. 837 (1947)-----	17
<u>DeCamp v. United States</u> , 56 App. D.C. 119, 10 F.2d 984 (1926)-----	15
<u>Dixon v. United States</u> , 111 U.S. App. D.C. 305, 296 F.2d 427 (1961)---	11
<u>Drohan v. Standard Oil Co.</u> , 163 F.2d 761 (7th Cir. 1948), cert. denied, 335 U.S. 845 -----	14
<u>Edwards v. United States</u> , 78 U.S. App. D.C. 226, 139 F.2d 365 (1943), cert. denied, 321 U.S. 769 (1944)-----	20
<u>Ellis v. United States</u> , 105 U.S. App. D.C. 86, 264 F.2d 372 (1959), cert. denied, 359 U.S. 998 -----	11
<u>Fretz v. United States</u> , 78 U.S. App. D.C. 290, 140 F.2d 468 (1944)---	23
<u>Glasser v. United States</u> , 315 U.S. 60, 80 (1942)-----	24
<u>Haggerty v. United States</u> , 5 F.2d 224 (7th Cir. 1925)-----	23
<u>Harris v. United States</u> , 63 App. D.C. 232, 71 F.2d 532, cert. denied, 293 U.S. 511 (1934)-----	14
<u>Hicks v. United States</u> , 150 U.S. 442 (1893)-----	23
<u>Jackson v. United States</u> , 112 U.S. App. D.C. 260, 302 F.2d 194 (1962)	11
<u>Johnson v. United States</u> , 195 F.2d 673 (8th Cir. 1952)-----	23
<u>Lanham v. United States</u> , 87 U.S. App. D.C. 357, 185 F.2d 435 (1950)---	24
<u>Lee v. United States</u> , 37 App. D.C. 442 (1911)-----	19

I N D E X (continued)

	<u>P a g e</u>
<u>Levine v. United States</u> , 104 U.S. App. D.C. 281, 261 F.2d F.2d 747 (1958)-----	19
<u>Martin v. State</u> , 217 Miss. 506, 64 S.2d 629 (1953)-----	14
<u>Morton v. United States</u> , 79 U.S. App. D.C. 329, 147 F.2d 28, cert. denied, 324 U.S. 875 (1945)-----	14
<u>Nye & Nissen v. United States</u> , 336 U.S. 613 (1949)-----	23
<u>Rexroat v. Com.</u> , 312 Ky. 199, 226 S.W. 2d 949 (1950)-----	14
<u>Richardson v. Gregory</u> , 108 U.S. App. D.C. 263, 281 F.2d 626 (1960)-----	14
<u>Roberts v. United States</u> , 109 U.S. App. D.C. 75, 284 F.2d 209 cert. denied, 368 U.S. 863 (1960)-----	22
<u>Russell v. District of Columbia</u> , (D.C. C.A.) 118 A.2d 519 (1955)-----	22
<u>Stewart v. United States</u> , 311 F.2d 109 (9th Cir. 1962)-----	23
<u>Thompson v. United States</u> , 88 U.S. App. D.C. 235, 188 F.2d 652 (1951)-----	22
<u>Thomas v. United States</u> , 93 U.S. App. D.C. 392, 211 F.2d 45, cert. denied, 347 U.S. 969 (1954)-----	17
<u>United States v. Brandenburg</u> , 144 F.2d 656 (3d Cir. 1944)-----	19
<u>United States v. Pabinowitz</u> , 339 U.S. 56, 63-64 (1950)-----	10
<u>Weeks v. United States</u> , 232 U.S. 383 (1914)-----	10
<u>Williams v. United States</u> , 108 U.S. App. D.C. 384, 282 F.2d 867, cert. denied, 365 U.S. 836 (1960)-----	22
<u>Witters v. United States</u> , 70 App. D.C. 316 106 F.2d 837 (1939)---	19

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

In a two-count indictment filed on May 20, 1963, appellant Young was charged with the offense of housebreaking (count 1) and carrying a dangerous weapon (count 2); appellant Stovall was charged only in count 1

with housebreaking (Criminal Case No. 439-^{1/}63). 22 D.C. Code § § 1801, 3204. A jury trial resulted in a verdict of guilty as charged as to all the defendants. On December 20, 1963, appellant Young was sentenced on count 1 to a term of imprisonment of from one (1) to five (5) years and on count 2 to a term of imprisonment of from (5) to fifteen (15) months, said sentences to run consecutively. An information was filed by the United States Attorney informing the District Court that on April 5, 1963, appellant Young was convicted of the crime of carrying a dangerous weapon (pistol), that imposition of sentence was suspended and he was placed on probation for a period of one year. Appellant Stovall's sentence was suspended and he was placed on probation for a period of three years. From the judgment and conviction entered below appellants have perfected these appeals.

Government's evidence

On April 19, 1963, Raleigh B. Tanner was the manager of a motel known as the Holiday Inn (Tr. 3) located at 730 Monroe Street, Northeast, in the District of Columbia (Tr. ^{2/}4). Officer Stays, a member of the

1/ A third defendant, Horace Chestnut was charged and convicted of house-breaking (count 1), but has not appealed his conviction.

2/ In order to facilitate reference to the three transcribed hearings held below, appellee adopts the same form of citation to the transcripts suggested in Appellant Young's Brief at p. 4.

Metropolitan Police Department, was working the twelve (midnight) to eight a.m. shift of duty and assigned to patrol an area that included the Holiday Inn located on Monroe Street (Tr. 105). As was his usual custom when working on that particular tour of duty, Officer Stays would visit the Holiday Inn and briefly converse with the manager. On April 19, 1963, Officer Stays visited the Holiday Inn at approximately 3:30 or 3:40 a.m. (Tr. 3, 106). At this time in the morning the front door of the motel was locked and the manager had to unlock the door to permit the officer to enter the lobby (Tr. 3, 106). Officer Stays then proceeded to the right side of the lobby near the counter and switchboard (Tr. 107). Approximately six minutes after the officer arrived, appellant Young and a juvenile companion entered the motel. The officer knew that anyone entering the lobby of the motel would not see him until they had entered the lobby and turned towards him (Tr. 116, 117, 129). This fact was corroborated by Mr. Tanner (Tr. 5).

Appellant Young and his companion entered the lobby with their right hands in their right-hand coat pockets (Tr. 6, 107, 122). The pockets were bulging and appeared to the police officer to contain a gun (Tr. 120). Appellant Young approached the manager (Tr. 8) and Officer Stays "looked up and saw them, they turned around to [him] as if amazed..." (Tr. 116). Officer Stays immediately came towards appellant Young and said "Hey, what is this?" (Tr. 108). As the officer approached Young he saw a third individual fleeing from the first of two sets of doors that lead into the motel lobby (Tr. 109). The juvenile companion then attempted to hide

his gun under a couch located in the lobby (Tr. 11, 109). The officer grabbed appellant Young's arm, withdrew it from his pocket and removed a pistol from his pocket (Tr. 108, 109). Young then unzipped his trousers with his left hand and asked for the rest room (Tr. 108, 180).

Shortly after the third individual fled from the outer door of the lobby, both Officer Stays and the manager heard the sound of a loud muffler (Tr. 39, 131). The officer then called into No. 12 Precinct Station, reported the crime and alerted the station to look for a car with a loud muffler (Tr. 110).

Lieutenant Chaney, the officer in charge of No. 12 Precinct Station on April 19, 1963, received Officer Stays' report of the crime and proceeded to the scene (Tr. 89). Approximately one block from the motel, Lieutenant Chaney observed a parked automobile with its rear lights blinking (Tr. 90). As he approached the vehicle it started to move at a rapid rate of speed and he became aware of the fact that the car had a loud muffler (Tr. 97). While pursuing the car he observed that it contained two males and that one climbed from the front seat to the back seat of the automobile (Tr. 91). The car was stopped and the two individuals were arrested and taken to the police station. Lieutenant Chaney identified the two individuals as Chestnut and appellant Stovall (Tr. 92), and the car in which they were riding as a Ford Galaxie, tag number SK 622 (Tr. 103). This car was subsequently identified as being registered to a Maude R. Young

(Tr. 278). Chestnut and appellant Stovall were then transported to the 12th Precinct Station ^{3/} (Tr. 99).

During the trial, Mr. Tanner, the manager of the motel, identified appellant Stovall as the individual who was standing by the outer door of the lobby and who fled upon seeing the police officer (Tr. 11, 79). Officer Stays identified Chestnut as the person he saw standing by the door and who then fled (Tr. 111, 132)

Evidence presented by appellants

The only witness called by the defense was Vernon Shakespeare Wilson, a porter at the motel ^{4/} (Tr. 235). He testified that he was seated in the lobby of the motel when the alleged crime occurred (Tr. 236). He saw appellant Young and the juvenile enter the motel but did not see a third individual (Tr. 236). He stated that appellant Young immediately asked for the rest room and that the police officer grabbed Young and began to search him (Tr. 236). He did not see the officer remove a gun from Young's pocket (Tr. 237), nor did he see Mr. Tanner's dog chase the third individual who fled ^{5/} (Tr. 243), or hear a car with a loud muffler (Tr. 240).

3/ At the precinct station Chestnut admitted that he was the look-out man for the planned robbery, and appellant Stovall admitted that he was to drive the "get away" car (Preliminary Hearing (Tr. 14). The juvenile admitted that they all intended to hold up the motel (Preliminary Hearing Tr. 10). None of the admissions were offered by the Government at trial.

4/ Neither appellants nor the third defendant, Chestnut testified.

5/ Mr. Tanner testified that his attention was called to appellant Stovall by his dog chasing him (Tr. 48).

STATUTES INVOLVED

Title 22, District of Columbia Code, Section 1801, provides:

Whoever shall, either in the night or in the daytime, break and enter, or enter without breaking, any dwelling, bank, store, warehouse, shop, stable, or other building, or any apartment or room, whether at the time occupied or not, or any steamboat, canal boat, vessel, or other watercraft, or railroad car, or any yard where any lumber, coal, or other goods or chattels are deposited or kept for the purpose of trade, with intent to break and carry away any part thereof or any fixture or other thing attached to or connected with the same, or to commit any criminal offense, shall be imprisoned for not more than fifteen years.

Title 22, District of Columbia Code, Section 3204, provides:

No person shall within the District of Columbia carry either openly or concealed on or about his person, except in his dwelling house or place of business or on other land possessed by him, a pistol without a license therefor issued as hereinafter provided, or any deadly or dangerous weapon capable of being so concealed. Whoever violates this section shall be punished as provided in section 22-3215, unless the violation occurs after he has been convicted in the District of Columbia of a violation of this section or of a felony, either in the District of Columbia or in another jurisdiction, in which case he shall be sentenced to imprisonment for not more than ten years.

Title 22, District of Columbia Code, Section 105, provides:

In prosecutions for any criminal offense all persons advising, inciting, or conniving at the offense, or aiding or abetting the principal offender, shall be charged as principals and not as accessories, the intent of this section being that as to all accessories before the fact the law heretofore applicable in cases of misdemeanor only shall apply to all crimes, whatever the punishment may be.

SUMMARY OF ARGUMENT

I

Appellant Young's contention that there was no probable cause for his arrest is without merit. Appellant accompanied by two companions entered a motel at approximately 3:30 a.m. Appellant and one of his companions entered the lobby of the motel with their right hands in their coat pockets. Their pockets were bulging and appeared to the trained eye of a police officer to contain guns. The third companion waited by the outer door of the lobby. A police officer who usually visited the motel on his tour of duty was standing at one end of the lobby. Long curtains that covered part of a glass wall prevented anyone who approached the motel lobby from seeing the police officer until they actually entered the lobby and turned to face him. When appellant Young and his accomplice saw the officer they registered an expression of amazement. The officer approached appellant and saw the third accomplice flee from the outer door. Seeing the third man flee, the police officer removed appellant's hand from his pocket and took a gun from inside the pocket. These facts justified the District Court's finding that the arrest was based upon probable cause.

II

The trial court did not abuse its discretion by excluding certain photographic slides that were offered to show the physical appearance of the scene of the crime. Whether to admit or exclude photographs is within the sound discretion of the trial judge. In the instant case the trial court found that the slides contained photographs of defense counsel standing where appellants believed the police officer was standing and found further that the pictures did not accurately depict the scene at the time the crime was committed.

III

The trial court did not abuse its discretion in denying appellant Young's motion for a judgment of acquittal. It was undisputed that Young entered the motel lobby. Young contends that he entered for the purpose of finding a rest room; the Government's evidence showed that he entered with the intent to steal. Whether or not appellant Young possessed the requisite criminal intent was a question of fact properly submitted to the jury by the trial court.

Appellant Stovall's contention that the trial court erred in denying his motion for a judgment of acquittal is similarly without merit.

The Government's evidence established that appellant Stovall was either a principal or an aider and abetter in the joint criminal venture. It was shown by the Government's witnesses that four persons participated in the crime. Two individuals, whose identity is not in dispute, actually entered the motel lobby. One individual stood by the outer door of the motel lobby and fled when he saw the police officer, and the fourth individual remained in a car with a loud muffler that was heard leaving the scene of the crime. The testimony of two Government witnesses was in conflict with respect to the identification of appellant Stovall as the accomplice who fled from the motel. However, both Stovall and Chestnut, also identified as the accomplices who fled, were apprehended shortly after the crime was committed, driving a car with a loud muffler. Resolving any conflict in the testimony is a function of the jury. The evidence as to appellants' participation in the crime supported the jury verdict.

ARGUMENT

I. The District Court properly denied appellant Young's motion to suppress

(See Tr. 107, 108, 111, 116, 117, 120, 122, 123, 174, 175, 177, 180, 207)

Appellant Young maintains that there was no probable cause for his arrest and that the search of his person, revealing possession of a pistol, was therefore illegal.

If probable cause for an arrest exists, a search of the person conducted incidental thereto is lawful. United States v. Rabinowitz, 339 U.S. 56, 63-64 (1950). Evidence found pursuant to such a search can be lawfully seized and is admissible against the accused at trial. Carroll v. United States, 267 U.S. 132 (1925); Weeks v. United States, 232 U.S. 383 (1914). Thus, if appellant Young was lawfully arrested the gun discovered in his pocket was lawfully seized and admissible at trial.

The threshold question is whether there was probable cause for Young's arrest. "Probable cause exists where 'the facts and circumstances within [the police officer's] knowledge *** [are] sufficient in themselves to warrant a man of reasonable caution in the belief that 'an offense has been or is being committed.'" Brinegar v. United States, 338 U.S. 160, 175 (1959). This concept of probable cause involves probabilities and practicalities viewed through the trained eye of a police officer, and not a check list of technicalities. The court must look to the circumstances existing at the moment of arrest, viewed in their entirety. If the circumstances so considered would impress upon the mind of a prudent

and cautious police officer a reasonable belief that a crime has been, is being, or is about to be committed, the arrest is lawful. Jackson v. United States, 112 U.S. App. D.C. 260, 302 F.2d 194 (1962); Dixon v. United States, 111 U.S. App. D.C. 305, 296 F.2d 427 (1961); Ellis v. United States, 105 U.S. App. D.C. 86, 264 F.2d 372 (1959), cert. denied, 359 U.S. 998; Bell v. United States, 102 U.S. App. D.C. 383, 254 F.2d 82 (1958), cert. denied, 358 U.S. 885. It is by this standard that appellant Young's arrest must be gauged.

Examining the circumstances involved herein, the record discloses that Officer Stays was standing in the lobby of the Holiday Inn Motel at approximately 3:40 a.m., conversing with the manager of the motel. The officer knew that persons entering the lobby through the front door could not see him until they had entered the lobby (Tr. 116, 117). Without hearing an automobile drive up to the front door, he observed two young men enter the lobby and "I observed their right hands in their right-hand pockets and they were protruding as if they had a gun" (Tr. 120, 107, 122, 123). As the two men walked into the lobby towards the manager, Officer Stays "looked up and saw them, they turned around to me as if amazed" (Tr. 116). Neither appellant Young nor his juvenile companion carried any luggage. ^{6/} The officer immediately approached Young and said "Hey what is this?" (Tr. 108.) A young man accompanied by a

6/ Appellant Young asserts that there were "numerous obvious reasons why the boys may have come to the motel lobby office at this hour" (Appellant Young's Br. 9); equally obvious was the fact that they did not appear to the officer to be prospective guests.

juvenile companion bent solely upon looking for the nearest rest room would not evoke such a reaction from a trained police officer. Upon seeing the police officer the two men registered a look of amazement; certainly, a person making an innocent request would not manifest such a noticeable expression. As Officer Stays moved towards appellant Young he observed a third individual--identified by the officer as Chestnut (Tr. 111)--standing by the outer door of the lobby (Tr. 174). Chestnut's reaction upon seeing the police officer was immediate flight (Tr. 175, 177). At this point Officer Stays grabbed Young's arm, pulling it out of his pocket. Simultaneously, Young unzipped his trousers with his left hand and requested the location of the rest room (Tr. 108, 180). Officer Stays then reached into Young's right-hand pocket and removed a Luger pistol (Tr. 108). Briefly summarizing the circumstances confronting the officer we find: (1) two men entering the motel lobby with their right hands in their coat pockets, that were bulging and appeared to a trained eye to contain a gun, (2) the time of day--3:40 a.m., (3) neither men carried any luggage, (4) the look of amazement upon seeing the officer, (5) the flight of the third man who gave the appearance of being a lookout, and (6) the inept act of unzipping his trousers in the front lobby of a motel.

7/ Regardless of the exigency of appellant Young's condition, his conduct--unzipping his trousers--was more indicative of nimble, ingenuous, reasoning by a trapped felon than of an innocent passerby seeking the use of a rest room.

Although all of these events occurred within a short space of time (Tr. 207), when viewed in their entirety they were sufficient to establish probable cause for the arrest. Adopting the language of Judge Prettyman in Bell v. United States, supra at 389, "[p]erhaps no one of these circumstances, taken separately would spell probable cause. We do not say it would. The officer was faced with a combination of circumstances. We must treat the situation as he faced it. We think that under these circumstances a police officer had reasonable grounds for belief that a felony had been committed and that these men had committed it. He had probable cause for arrest." The record reflects that Officer Stays acted instinctively to protect the lives of the people in the motel lobby, and the facts and circumstances preceding the arrest and subsequent to the arrest support his reaction.^{3/} Appellant Young suggests to this Court that a more experienced police officer would have handled the situation differently (Appellant Young's Br. 9). Without speculating as to the exact procedure appellant Young would have the officer follow, we submit that had Officer Stays not acted when he did, he may have been effectively foreclosed from obtaining the experience that appellant Young suggests was lacking.

1/ Even if subsequent facts had shown the officer to have been mistaken, the law recognizes that mistakes in judgment will occur. The law requires that "the mistakes must be those of reasonable men, acting on facts leading sensibly to their conclusions of probability." Brinigar v. United States, supra at 176; Bell v. United States, supra.

II. The District Court did not err in refusing to admit certain photographic slides into evidence.

(See Motion Tr. 29, 34-35, 40, 42, 44, 152-153; and Tr. 156)

Appellant Young maintains that the trial court erred in excluding photographic slides taken by defense counsel three months after the offense (Motion Tr. 29, 34-35).

It is now well settled that the admission or exclusion of photographs in a criminal or civil trial is a matter within the sound discretion of the trial judge, because he is in the best position to determine whether the photographs properly reflect the circumstances sought to be depicted. Richardson v. Gregory, 108 U.S. App. D.C. 263, 281 F.2d 626 (1960); Drohan v. Standard Oil Co., 168 F.2d 761 (7th Cir. 1948), cert. denied, 335 U.S. 845; Chicago G.W.R. Co. v. Robinson, 101 F.2d 994 (8th Cir. 1939), cert. denied, 307 U.S. 640.

It is equally well established that if the photographs are shown, by competent testimony, to accurately represent the physical surroundings sought to be depicted, they are admissible. Morton v. United States, 79 U.S. App. D.C. 329, 147 F.2d 28, cert. denied, 324 U.S. 875 (1945); Harris v. United States, 63 App. D.C. 232, 71 F.2d 532, cert. denied, 293 U.S. 581 (1934). However, a photograph of a person or object taken for the sole purpose of showing the precise position of a party or to show where some moving or movable object was located at some prior given time, is not competent, because it is self serving and not corroborative. Rexroat v. Com., 312 Ky. 199, 226 S.W.2d 949 (1950); Martin v. State, 217 Miss. 506, 64 S.2d 629 (1953); Buie v. State, 217

Miss. 695, 64 S.2d 897 (1953). To be relevant as a visual adjunct to oral testimony, the pictures must accurately depict the object at the time of the accident or crime. If they fail in this latter aspect, then they fail as a visual aid to the trier of the facts and are inadmissible. See Coupe v. United States, 72 App. D.C. 86, 89, 113 F.2d 145, cert. denied, 310 U.S. 651 (19); DeCamp v. United States, 56 App. D.C. 119, 10 F.2d 984 (1926).

We submit that the photographic slides offered in the instant case did not meet the standards of admissibility set forth above. Instead of presenting the jury with pictures of the motel lobby as it existed at the time of the crime, the evident purpose of the photographs (marked as Defendants' Exhibits 3-12 for identification) was to portray appellants' contention as to the respective positions of the appellant Young and the police officer. In one slide, trial counsel for defendant Chestnut was photographed in the position that the defense believed Officer Stays occupied on April 19, 1963. Officer Stays testified that he was not standing in the posed position (Motion Tr. 40). In another slide the position of the drapes, used to cover a portion of a glass wall, had been changed (Motion Tr. 40). Another slide failed to show the couch located in the lobby (Motion Tr. 40). Another slide taken to show the officer's view did not accurately represent the correct angle of his view (Motion Tr. 42). It became readily apparent in the hearing on the motion to suppress that the slides were self-serving and were not an accurate representation of the motel lobby as it appeared on April 19, 1963. Indeed, the judge who heard the motion to suppress on July 19, 1963,^{f/} stated: "I don't think the pictures are helping too

^{f/} The motion to suppress was heard and denied by Judge Leonard P. Walsh.

much" (Motion Tr. 44). Judge Walsh's comment belies appellant Young's statement that "in the case at bar, the photographs portray the physical conditions exactly as they existed at the time of the alleged crime, except for the easily explained reason for withdrawing the drapes . . ." (Appellant Young's Br. 25).

During the trial, appellant Young sought to introduce the slides in evidence. The trial judge indicated that he would admit the slides if they accurately portrayed the physical appearance of the motel that existed on April 19, 1963 (Tr. 152-153). The Government objected to their admission on the grounds that they were "posed pictures" and further that they did not accurately depict the scene at the time of the alleged crime (Tr. 153). Thereafter the trial court viewed the slides and ruled they were inadmissible. The basis for the court's ruling was:

The slides or photos were posed---taken at a different time of day, different season of the year, with certain alterations of the situation as it existed on the morning of the occurrence---certain curtains were moved back, giving an entirely distorted and inaccurate result, with the opportunity of view entirely changed from what it was at the time of the alleged housebreaking. Explanation necessary to adjust to conform to the existing situation would make for confusion rather than clarity. (Tr. 156.)

the

In view of preliminary determination by the trial court that the slides did not accurately represent the scene of the crime, appellant Young's argument that the trial court abused its discretion in excluding the pictures, is without merit.

III. The District Court properly denied appellants' motion for judgment of acquittal.

(See Tr. 11, 89, 91, 92, 97, 98, 107, 108, 110, 111, 120, 122, 123, 125, 131, 139, 140, 174, 180, 276)

It is well settled that "upon a motion for a directed verdict, the judge must assume the truth of the Government's evidence and give the Government the benefit of all legitimate inferences to be drawn therefrom". Curley v. United States, 81 U.S. App. D.C. 389, 392, 160 F.2d 229, cert. denied, 331 U.S. 837 (1947); Bates v. United States, 95 U.S. App. D.C. 57, 219 F.2d 30, cert. denied, 347 U.S. 961 (1955); Cooper v. United States, 94 U.S. App. D.C. 343, 218 F.2d 39 (1954); Thomas v. United States, 93 U.S. App. D.C. 392, 211 F.2d 45, cert. denied, 347 U.S. 969 (1954). "The true rule * * * is that a trial judge, in passing upon a motion for directed verdict of acquittal, must determine whether upon the evidence, giving full play to the right of the jury to determine credibility, weigh the evidence, and draw justifiable inferences of fact, a reasonable mind might fairly conclude guilt beyond a reasonable doubt. * * * If he concludes that either of the two results, a reasonable doubt or no reasonable doubt is fairly possible, he must let the jury decide the matter." 81 U.S. App. D.C. at 392-393. "If the evidence reasonably permits a verdict of acquittal or a verdict of guilt, the decision is for the jury to make." 81 U.S. App. D.C. at 397.

The evidence in the instant case was ample to require submission to the jury of Counts 1 and ⁽²⁾2 against the appellant Young and Count 1 against the appellant Stovall, and was sufficient to support the jury verdict rendered against both appellants.

⁽¹⁾ Appellant Young limits his sufficiency argument to the housebreaking Count. (Appellant Young's Br. 31)

A. The District Court properly denied appellant Young's motion for a judgment of acquittal.

With respect to appellant Young it is undisputed that he entered the motel lobby at approximately 3:40 a.m. on the morning of April 19, 1963. The sole question presented is whether the Government proved that he entered the motel with the intent to steal. We submit that the evidence fully supports the jury verdict that Young entered the motel with the intent to steal. The record reflects that Young and his juvenile companion entered the motel lobby in the early morning hours of April 19, 1963. A third companion, identified as either Chestnut or Stovall, was observed standing by the outer door of the lobby. Young and his companion entered the lobby with their right hands in their right hand coat pocket (Tr. 107). The pockets were bulging and appeared to contain guns (Tr. 120, 122, 123). By pure happenstance a police officer, whose assigned area included the Holiday Inn motel, happened to be in the motel lobby conversing with the manager. He was standing in a position that prevented a person entering the lobby from seeing him until such time as the person actually entered the lobby and turned towards him (Tr. 125). Upon seeing the officer, appellant Young registered a look of amazement (Tr. 116). The officer's immediate reaction upon observing Young and his companion was to say "Hey, what is this?" (Tr. 108). Approaching Young, the officer observed a third individual flee from the outer vestibule (Tr. 174). He subsequently identified the third individual as Chestnut (Tr. 111). The officer then grabbed Young's arm, withdrawing it from his pocket, reached into the pocket and removed a Luger pistol (Tr. 108). The manager of the motel then observed that appellant Young's juvenile companion was attempting to hide his gun under a couch located in the lobby (Tr. 11). The police officer then took Young out of the lobby for the purpose of locating the whereabouts of the individual who fled upon seeing the

officer. Outside of the lobby the officer heard the sound of an automobile with a loud muffler and saw a car driving over a bridge that passed over the motel (Tr. 131, 139, 140). Officer Stays then called No. 12 Precinct Station and requested that a search be made for an automobile with a loud muffler (Tr. 110).

When the officer removed Young's hand from his pocket, Young immediately, with his left hand, unzipped his trousers and requested the location of the rest room (Tr. 108, 180). Neither Young nor his juvenile companion made any other statement in the motel lobby as to their purpose for entering the motel.

Upon these facts we submit that the jury could find that appellant Young and his companion entered the motel with the criminal intent to steal. Criminal intent is usually a question for the jury that can be inferred from facts and circumstances that reasonably tend to manifest a mental attitude. Cummings v. United States, 289 F.2d 904 (10th Cir. 1961), cert. denied, 368 U.S. 850; Levine v. United States, 104 U.S. App. D.C. 281, 261 F.2d 747 (1958). Since criminal intent is a mental state it is rarely susceptible of direct proof and will often depend upon many factors and may be inferred from outward acts and all the attending circumstances. Brennan v. United States, 240 F.2d 253 (8th Cir. 1957), cert. denied, 353 U.S. 931; cf. Witters v. United States, 70 App. D.C. 316, 106 F.2d 837 (1939).

The fact that appellant Young did not actually commit the offense of robbery does not preclude the jury finding him guilty of housebreaking, since the commission of the additional offense is not necessary to complete the crime. Lee v. United States, 37 App. D.C. 442 (1911); United States v. Brandenburg, 144 F.2d 656 (3d Cir. 1944). Similarly it was not necessary for the Government

to prove that appellant Young committed any overt act with respect to the additional crime. The statute (22 D.C. Code § 1801) proscribes entry with the intent to commit a crime therein, and intent implies only a state of mind. Witters v. United States, *supra*.

We believe that the following facts: 1. the time of day; 2. entry into the lobby carrying concealed weapons in their right hands; 3. the look of amazement upon seeing the police officer; 4. the absence of luggage; 5. the flight of the third individual upon seeing the police officer; 6. Young's conduct of unzipping his trousers in the middle of a motel lobby and 7. the juvenile's attempt to hide his gun; when viewed as a total picture, clearly proved beyond a reasonable doubt or at least presented a jury question that appellant Young entered the motel with the criminal intent to steal. See Edwards v. United States, 78 U.S. App. D.C. 226, 139 F.2d 365 (1943), cert. denied, 321 U.S. 769 (1944).

B. The District Court properly denied appellant Stovall's motion for a judgment of acquittal.

After Officer Stays arrested Young and his companion he requested No. 12 Precinct Station to conduct a search for an automobile with a loud muffler (Tr. 110). Lieutenant Chaney, the officer in charge of No. 12 Precinct Station on April 19, 1963, received the report from Officer Stays that a crime had been committed at the Holiday Inn (Tr. 89). Lieutenant Chaney responded to the scene of the alleged crime and "was looking for a vehicle with a loud muffler" (Tr. 89). While traveling in the vicinity of Ninth and Monroe Streets, Lieutenant Chaney observed a parked vehicle with its tail lights flashing, about one block from the motel (Tr. 97). As he approached the vehicle, it started to move at "a fairly fast rate of speed" (Tr. 98). Lieutenant Chaney pursued the vehicle and detected that it had a loud muffler (Tr. 98). While pursuing the car, Chaney observed two males in the car and he then observed that one of the males climbed from the front seat to the back seat (Tr. 91). At trial, Lieutenant Chaney identified Chestnut and appellant Stovall as the two individuals that he arrested and removed from the car (Tr. 92). Chaney identified the vehicle he stopped as a Ford Galaxie bearing tag number SK 622 (Tr. 103). This vehicle was later identified as being registered to a Maude R. Young (Tr. 278).

At trial Officer Stays identified Chestnut as the individual he saw flee from the outer vestibule of the motel lobby at the time of the offense (Tr. 111). Mr. Tanner the manager of the motel identified appellant Stovall as the third individual that fled from the vestibule

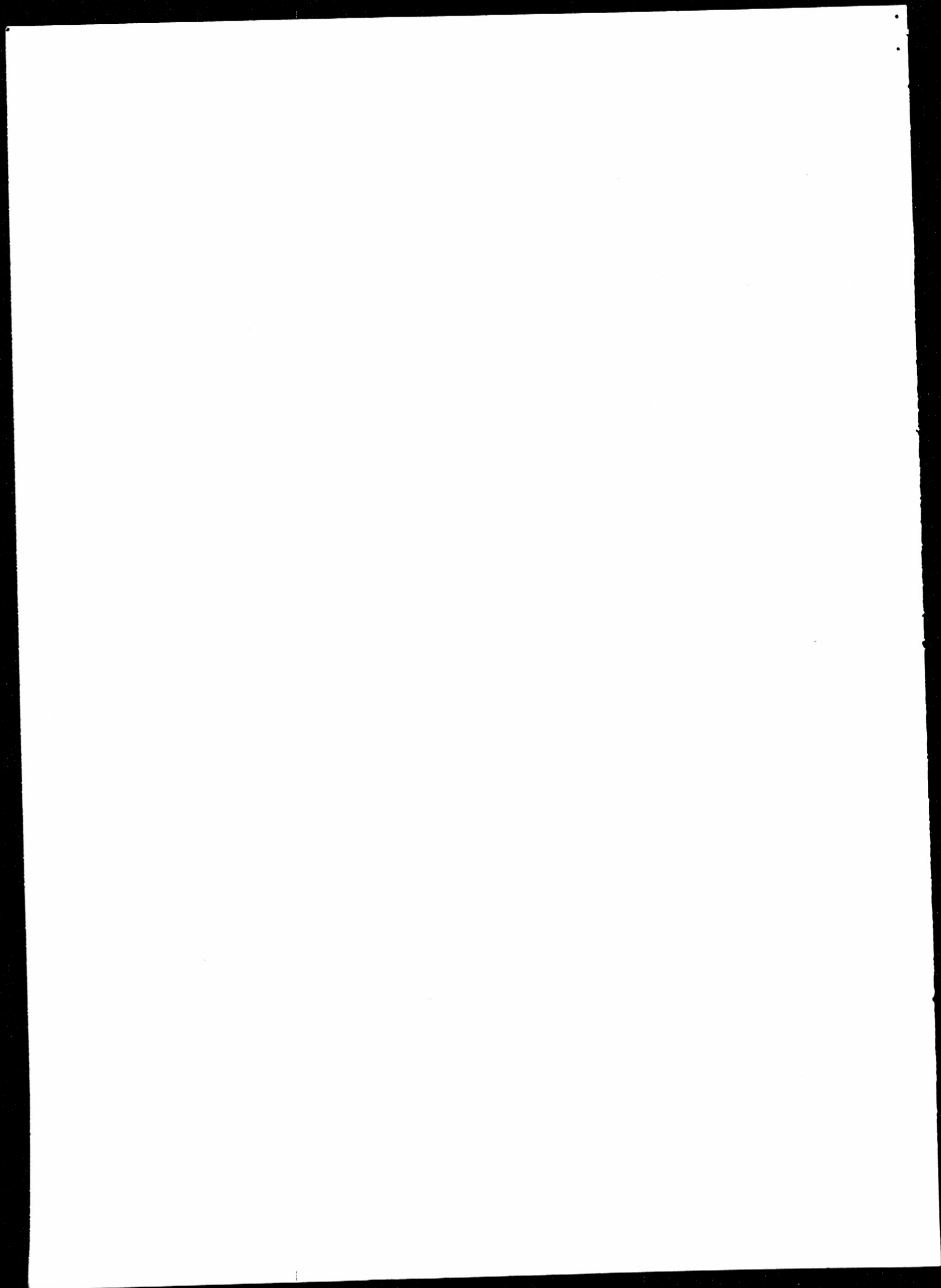
(Tr. 11). Appellant argues that this Court should reverse his conviction because of the conflicting identification testimony of Officer Stays and Mr. Tanner.

We submit that under the circumstances of this case the conflicting testimony relating to the identification of the third individual in the motel did not require the District Court to grant appellant Stovall's motion for a judgment of acquittal nor does it require this Court to reverse the conviction. Direct conflicts between the testimony of witnesses, whether they are defense or prosecution witnesses, are to be resolved by the trier of the facts. Russell v. District of Columbia, (D.C. C.A.) 118 A.2d 519 (1955). The jury, as the triers of the facts, is charged with the duty of determining the credibility of the witnesses, resolving any conflict in the testimony and accepting or rejecting such parts of the testimony as it sees fit. Cooper v. United States, supra. It is the jury's function to pass upon the powers of observation of the witnesses. Thompson v. United States, 88 U.S. App. D.C. 235, 188 F.2d 652 (1951), and it is the jury's function to determine whether or not appellant Stovall was sufficiently identified as a participant in the crime. Cf. Roberts v. United States, 109 U.S. App. D.C. 75, 284 F.2d 209, cert. denied, 368 U.S. 863 (1960); Bell v. United States, 108 U.S. App. D.C. 169, 280 F.2d 717 (1960); Williams v. United States, 108 U.S. App. D.C. 384, 282 F.2d 867, cert. denied, 365 U.S. 836 (1960).

If the jury believed that appellant Stovall was the third individual to enter the motel and was acting as the lookout for appellant Young and his juvenile companion, then Stovall would be equally responsible

with appellant Young. Fretz v. United States, 78 U.S. App. D.C. 290, 140 F.2d 468 (1944). If the jury believed that Chestnut was the person who fled from the motel, then they could find from the evidence that appellant Stovall aided and abetted the other three participants by driving the "getaway" car, and was equally responsible with the principals. 22 D.C. Code 105.

Assuming arguendo, that the jury found Stovall to be an aider and abettor, clearly, their verdict is supported by the evidence. The record reflects that Stovall was arrested in a car with a loud muffler, one block from the scene of the crime. His driving companion was Chestnut, identified by Officer Stays as the person who fled from the motel. The car in which he was riding was parked until approached by Lieutenant Chaney and then they attempted to drive away at "a fairly fast rate of speed" (Tr. 98). Lieutenant Chaney observed that one of the two individuals in the car climbed from the front to the back seat. We submit that the jury could properly find that appellant Stovall shared in the criminal intent of his three companions and was actively assisting in the perpetration of the crime. Nye & Nissen v. United States, 336 U.S. 613 (1949); Johnson v. United States, 195 F.2d 673 (8th Cir. 1952). The fact that he was thwarted in performing his assigned task in the criminal venture does not alter his status as an aider and abettor. Hicks v. United States, 150 U.S. 442 (1893); Haggerty v. United States, 5 F.2d 224 (7th Cir. 1925). The fact that he is charged as a principle does not affect his conviction based upon evidence that he aided and abetted. Stewart v. United States, 311 F.2d 109 (9th Cir. 1962). It is submitted that the evidence tended to show a chain of circumstances



from which a jury could reasonably conclude that appellant Stovall was an active participant in the housebreaking. Cf. Larham v. United States, 87 U.S. App. D.C. 357, 185 F.2d 435 (1950).

The jury having returned a verdict of guilty, their verdict must be sustained where there is some evidence to support it taking the view most favorable to the Government. Glasser v. United States, 315 U.S. 60, 80 (1942); Curley v. United States, supra; Morton v. United States, 79 U.S. App. D.C. 329, 147 F.2d 28 (1945), cert. denied, 324 U.S. 875.

CONCLUSION

Wherefore, it is respectfully submitted that the judgment of the District Court should be affirmed.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing mimeographed brief has been mailed to attorneys for appellants, Robert S. Hope, Esq., J. Lovering Truscott, Esq., Tower Building, 1405 K Street, Northwest, Washington, D. C., 20005, and William Wells Beckett, Esq., 641 N. Hampshire Avenue, Hyattsville, Maryland, this 27th day of May, 1964.

/s/ ALAN KAY
ALAN KAY
Assistant United States Attorney

BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 18,403

MICHAEL L. STOVALL, APPELLANT,

v.

UNITED STATES OF AMERICA, APPELLEE.

APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

United States Court of Appeals
for the District of Columbia Circuit

FILED MAY 1 1964

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May 1, 1964

QUESTION PRESENTED

1. Whether the trial court erred in failing to grant appellant's motions for a directed verdict of acquittal on the ground that there is no substantial evidence supporting appellant's guilt on the indictment of housebreaking.

TABLE OF CONTENTS

	<u>Page</u>
JURISDICTIONAL STATEMENT	1
STATEMENT OF THE CASE	2
RULE INVOLVED	5
STATEMENT OF POINTS	5
SUMMARY OF ARGUMENT	6
ARGUMENT	7
I. There is no substantial evidence identifying appellant either as a principal or as an aider and abettor in the alleged offense at Holiday Inn	7
1. The evidence cannot support a finding that appel- lant entered the motel	8
2. The evidence cannot support a finding that the car in which appellant was riding when arrested con- nected him with the alleged offense	9
3. The evidence cannot support a finding that Chest- nut's presence in the car with appellant con- nected appellant with the alleged offense	10
4. There is in no event sufficient evidence to support a finding that appellant aided and abetted in the alleged offense	11
II. The absence of sufficient evidence to establish beyond a reasonable doubt appellant as either a principal or as an aider and abettor in the alleged housebreaking re- quires a judgment of acquittal	14
CONCLUSION	16

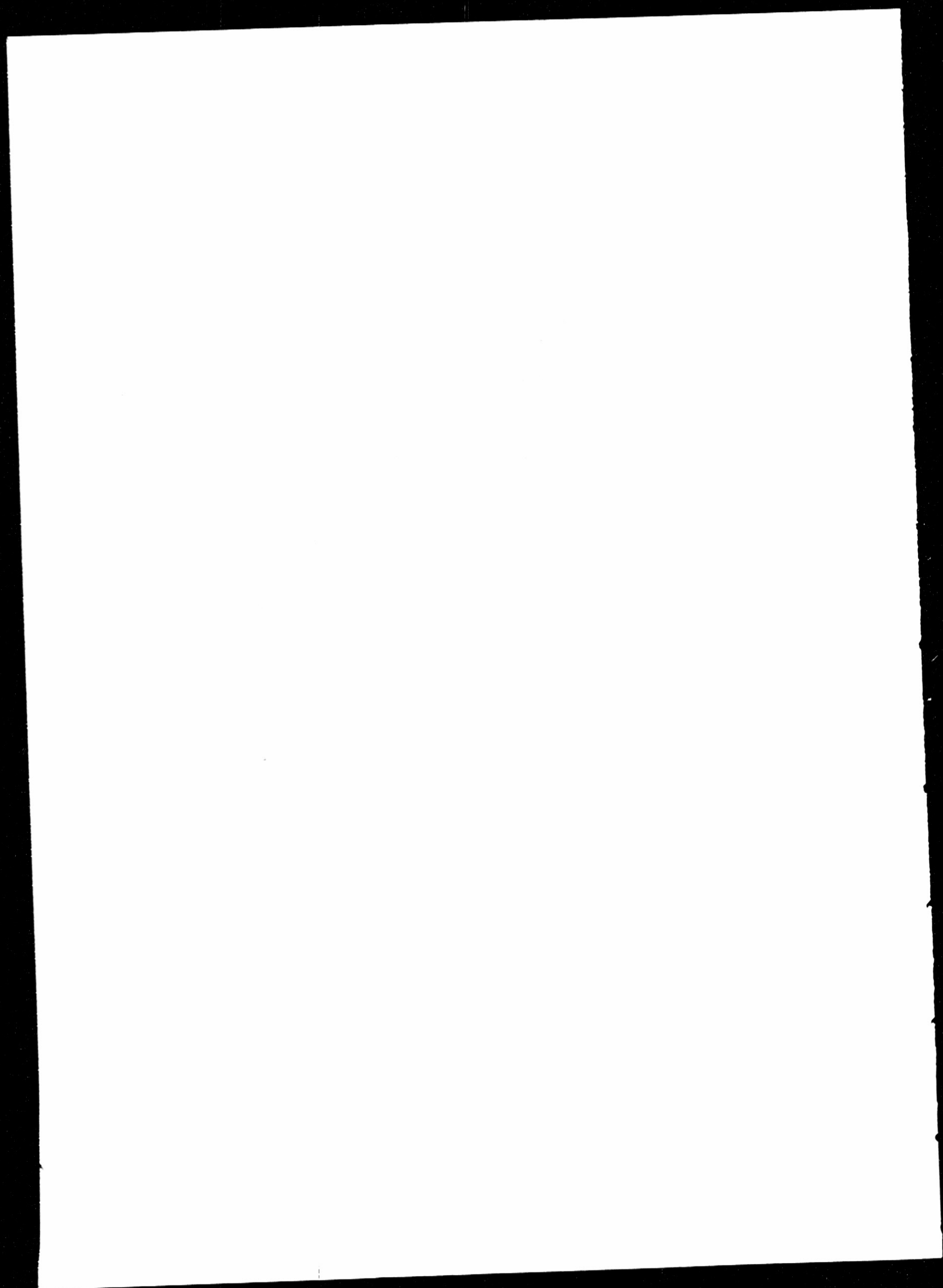
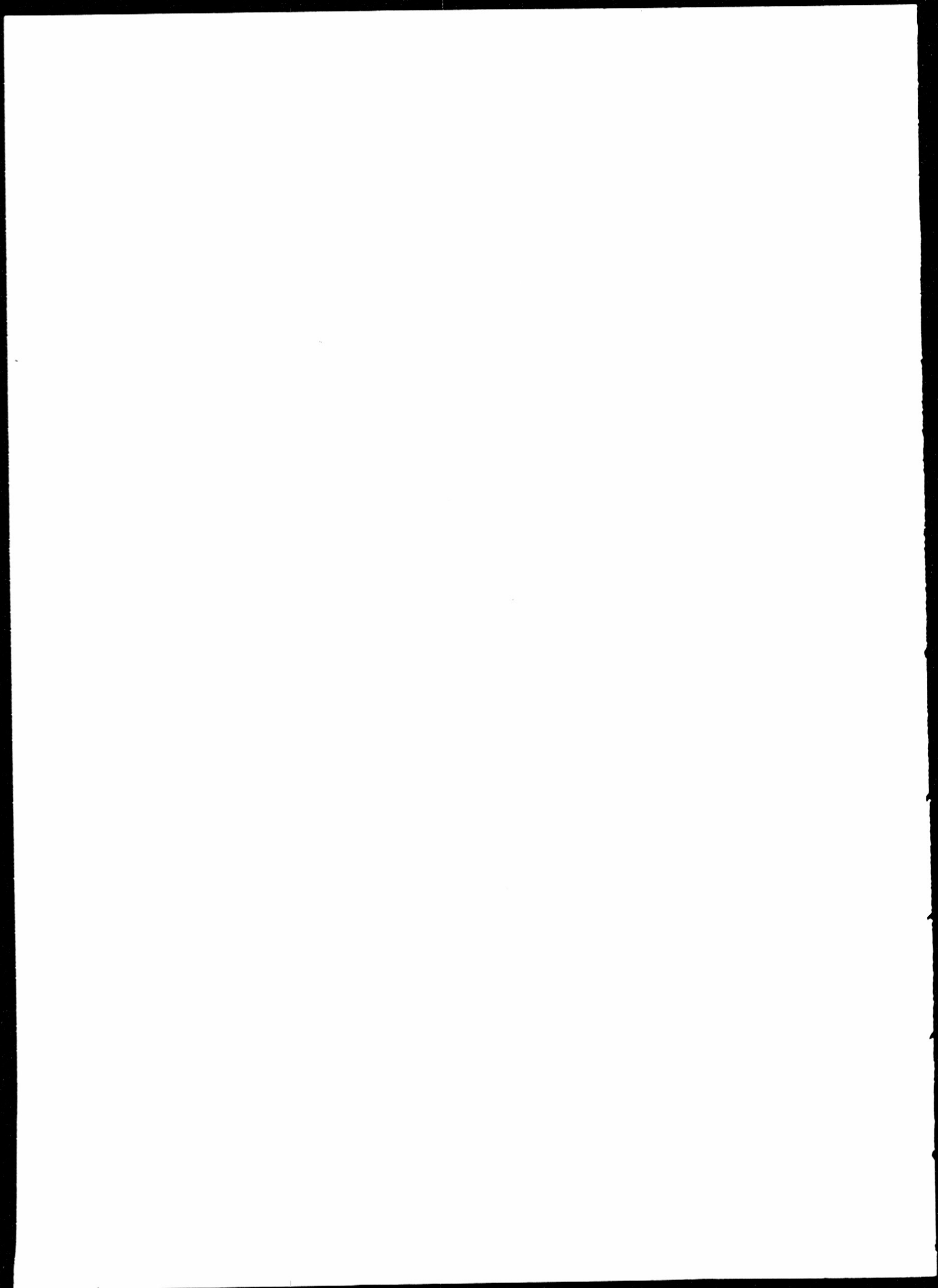


TABLE OF AUTHORITIES

	<u>Pages</u>
 1. <u>Decisions</u>	
Campbell v. United States, 115 U.S. App. D.C. 30, 316 F.2d 681, 683 (1963)	7, 15
Cooper v. United States, 94 U.S. App. D.C. 343, 218 F.2d 39, 41-42 (1954)	7, 13, 15
Egan v. United States, 52 App. D.C. 384, 287 Fed. 958, 964 (1923)	12
Johnson v. United States, 195 F.2d 673, 675-76 (8th Cir. 1952)	7, 12, 13
Middleton v. United States, 106 U.S. App. D.C. 50, 269 F.2d 241 (1959)	15
Miller v. United States ____ U.S. App. D.C. ____, 320 F.2d 767, 773 (1963)	13
Scott v. United States, 98 U.S. App. D.C. 105, 232 F.2d 362, 364 (1956)	15
Tomlinson v. United States, 68 App. D.C. 106, 93 F.2d 652, 655 (1937), cert. denied, 303 U.S. 646 (1938). .	12
Wong Sun v. United States, 371 U.S. 471, 483-84 (1963). .	13
 2. <u>Statutes</u>	
District of Columbia Code	
Section 22-105	12, 14
Section 22-106	14



UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,403

MICHAEL L. STOVALL,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

Appeal from a Judgment of the United States District Court
for the District of Columbia

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

An indictment was filed on May 20, 1963 in the United States District Court for the District of Columbia charging Michael L. Stovall (appellant herein), Leslie R. Young, and Horace Chestnut with housebreaking in violation of Section 22-1801 of the D.C. Code.^{1/} A second count of the indictment charged only Young with carrying a dangerous weapon (a pistol)

^{1/} The indictment charged specifically that the three defendants "entered the building of Frank M. Perper and Julian Savage, with intent to steal property of another."

without a license, in violation of section 22-3204 of the D. C. Code. After a joint trial, on November 4, 1963, all three defendants were found guilty of housebreaking and Young was found guilty also of the dangerous weapon charge. Final judgment and commitment were entered by the District Court on December 20, 1963. Pursuant to motion filed by appellant in person, the District Court on January 2, 1964 ordered that he be allowed to proceed on appeal without prepayment of costs and that his request for appointment of counsel on appeal be referred to this Court. On February 11, 1964, this Court appointed the undersigned to represent appellant herein. Jurisdiction of this Court is invoked under the Act of June 25, 1948, c. 646, 62 Stat. 929, 930 as amended, 28 U.S.C. §§1291, 1294.

STATEMENT OF THE CASE

At about 3:40 A.M. on April 19, 1963, police patrolman James L. Stays, in the course of his rounds, stopped by the Holiday Inn motel at 730 Monroe Street, Northeast. He entered the main lobby of the Inn and went behind the counter (Tr. 104-106). Also in the lobby were Raleigh B. Tanner, the manager of the Inn, and Vern S. Wilson, the bellhop (Tr. 12). At about 3:45 A.M., two persons entered the lobby through the front entrance (Tr. 107), which consisted of two sets of doors, one from the outdoors into a vestibule and the other from the vestibule into the lobby. Both sets of doors were unlocked (Tr. 46). Stays and Tanner identified Young as one of the persons who entered the lobby and Stays identified a juvenile not involved in the trial as the other (Tr. 9-10, 107).

There is no evidence whatever that either appellant or Chestnut was one of the persons who entered the lobby. Upon taking not more than two or three steps inside the lobby, one of the two asked where the rest room was. At the same time officer Stays had stepped out from behind the counter and grabbed Young. Tanner at the same time detained the juvenile (Tr. 7-9, 108, 236). Stays testified that he then took a pistol out of Young's pocket (Tr. 109-110), but both Tanner and Wilson testified that he first took Young outside and upon returning a few minutes later showed them a pistol which he said he found on Young. (Tr. 18, 237-38). There is no evidence, except for the question as to the location of the rest room, that either Young or the juvenile spoke any words during this time.

The evidence as to the presence of a third person at the general scene of this incident, and as to the identity of that person (if there was one), is in irreconcilable conflict. The prosecution's two witnesses, Tanner and Stays, testified that a third party was standing in the vestibule of the motel at the time Young and the juvenile were in the lobby, and that that party ran away when Stays accosted Young. Both Tanner and Stays admitted that they did not get a good look at the person (Tr. 76, 175-76), yet each purported to make an identification at the trial. Tanner claimed that appellant was the individual in the vestibule (Tr. 11); Stays claimed that another co-defendant, Chestnut, was the one in the vestibule (Tr. 111, 181-82). And the only other witness who was present, bellhop Wilson, testified that there was no one

in the vestibule and no one who ran away from the scene (Tr. 236, 241-42).

Tanner and Stays testified that after the third person ran, there was the sound of a car with a loud muffler somewhere outside (Tr. 31, 110). Stays testified that he went outside to try and identify the car but was unable to see it (Tr. 187). He then called the precinct and issued a lookout for a car with a loud muffler (Tr. 110).^{2/} It was only conjecture on Stays' part that whoever was in that car had any connection with the incident at the motel, because he did not see anyone enter a car nor did he see any car leave the scene (Tr. 110, 187).

A short time later, appellant and Chestnut were arrested by Lieutenant Chaney at Tenth and Kearney Streets, Northeast (Tr. 91). Chaney testified that after receiving a radio report at the 12th precinct station house of the incident at the motel, he drove in his own car to Twelfth and Monroe Streets. There he met several other officers who told him to look for a car with a loud muffler. He then drove down Ninth Street, noticed a parked car pull out from the curb in front of him, and followed it. Chaney testified that the car had a loud muffler. After following it for a few blocks and noticing that there

^{2/} Stays' testimony on this point is directly contradicted by the transcript of the Police Department Communications and Record Bureau, which shows that a radio lookout was issued for "a red '52 or '53 Plymouth with 2 negro males last seen leaving the Holiday Inn about 5 minutes ago. Direction unknown . . . Vehicle bearing Maryland tags" (Tr. 274). That broadcast, based on Stays' notification of the incident and issued at the same time, made no mention of a car with a loud muffler. Moreover, it is uncontroverted that the car in which appellant and Chestnut were riding when they were subsequently arrested, was not a red '52 or '53 Plymouth with Maryland tags (Tr. 103).

were two occupants, he stopped the car and arrested appellant and Chestnut (Tr. 89-95). Apart from the testimony about the muffler, there is no evidence whatever connecting that car with the incident at the motel nor with the two individuals, Young and the juvenile, who had previously entered the motel.

At the conclusion of the Government's case in the joint trial of appellant, Young and Chestnut, appellant moved for a directed verdict of acquittal on the ground inter alia that the testimony of the only two Government witnesses at the scene of the alleged offense was in direct conflict as to the identity of the individual who they claimed ran from the vestibule. The motion was denied (Tr. 224-26). It was renewed after the testimony of the defense's sole witness, bellhop Wilson, and was again denied (Tr. 266-67).

Appellant was adjudged guilty of housebreaking, from which judgment this appeal is taken.

RULE INVOLVED

. . . The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses. . . . F.R. Crim. P. 29(a).

STATEMENT OF POINTS

1. The trial court erred in failing to direct a verdict of acquittal of appellant on the ground that the evidence was insufficient to

identify him as either a principal or an aider and abettor in the alleged housebreaking.

SUMMARY OF ARGUMENT

First, the evidence cannot support a finding that appellant entered the motel. The Government's witnesses agreed that he was not one of the two persons who entered the lobby. They testified that a third person was in the vestibule of the motel for a brief moment but their respective identifications of that person were uncertain and in direct conflict. Moreover, another witness testified that there was no third person at all in the vestibule.

Second, the evidence cannot support a finding that the car in which appellant was riding when arrested connected him with the alleged offense at the motel. The Government's witnesses testified that they heard a car with a loud muffler after the third person ran out of the vestibule but neither one saw any car. The fact that the car in which appellant was arrested also had a loud muffler is too tenuous a link with the motel incident to support a conviction. That link is not sufficiently strengthened by the presence in the car with appellant of Chestnut, another defendant. The identification of Chestnut as the person in the vestibule of the motel was wholly inadequate because the testimony was in irreconcilable conflict and the one witness who purported to identify him caught only a fleeting glimpse of a person running away from the motel.

Third, there is in no event sufficient evidence to support a finding that appellant aided and abetted in the alleged offense. The

evidence does not, for example, establish beyond a reasonable doubt that he consciously acted in furtherance of an unlawful common design (an essential element of aiding and abetting), even if he was sitting in a car at the time the motel incident occurred and even if he had knowledge of what the other defendants were doing (assuming, arguendo, that what they were doing was unlawful). Johnson v. United States, 195 F.2d 673, 675-76 (8th Cir. 1952). Since the evidence created at the most a suspicion that appellant aided in the alleged housebreaking, the trial court erred in failing to grant the motion for entry of a judgment of acquittal, and this court should now direct the entry of such judgment. Cooper v. United States, 94 U.S. App. D.C. 343, 218 F.2d 39, 42 (1954); Campbell v. United States, 115 U.S. App. D.C. 30, 316 F.2d 681, 683 (1963).

ARGUMENT

- I. There is no substantial evidence identifying appellant either as a principal or as an aider and abettor in the alleged offense at Holiday Inn.

In convicting appellant of housebreaking, the jury must have concluded one of two things: either (1) that appellant entered the vestibule of the Holiday Inn with the intent to steal the property of another or for the purpose of aiding and abetting Young and the juvenile in so stealing; or (2) that appellant aided and abetted those committing the alleged offense of housebreaking by remaining in the car with knowledge and in furtherance of his associates' criminal activity and for the purpose of driving them away from the scene. On the basis of the evidence

of record, it is submitted that a jury could not have found either of the foregoing beyond a reasonable doubt.

With respect to the argument on this point which follows, appellant desires the Court to read the following pages of the reporter's transcript: Tr. 9-11, 39, 76-77, 103, 107, 173, 175-77, 181-83, 187, 200, 236, 240-42, 274-75.

1. The evidence cannot support a finding that appellant entered the motel.

The Government's two witnesses agreed that only Young and the juvenile came into the lobby (Tr. 9-10, 107). They both claimed also to have caught a brief glimpse of a third person in the vestibule, between the outer and inner doors, who then ran away. But their identifications of that person were not only uncertain but also in direct conflict. The motel manager, Tanner, identified appellant as the person in the vestibule (Tr. 11) but admitted (Tr. 76-77) that he never got a good look at him. Police officer Stays, on the other hand, stated that the person in the vestibule was not appellant but Chestnut (Tr. 181-82). Stays was certain it was not appellant but when asked whether he was positive that it was Chestnut, answered "Not completely. I wouldn't say for sure." (Tr. 181-82).

To compound this confused state of the evidence, bellhop Wilson, who was seated in the lobby and had a view of the vestibule, testified that two men entered the lobby but that there was no third person at all in the vestibule (Tr. 236, 241-42).

In questioning Tanner, who had identified appellant, the Government made no attempt to elicit a description of the person he claimed to have seen in the vestibule -- of his size, distinguishing facial or other physical characteristics, clothing, mannerisms, etc. Nor had Tanner at any time picked appellant from a line-up of persons of similar stature, build or appearance. Even standing alone, such testimony constituted wholly insufficient identification of appellant as the alleged third person in the motel. And the testimony of the two other witnesses, Stays and Wilson, created as a matter of law a reasonable doubt that appellant was present in the vestibule.

Thus, unless the evidence was sufficient for the jury to find beyond a reasonable doubt that appellant aided and abetted in the alleged offense by remaining outside in a car, his conviction cannot stand. As we now show, that evidence does not establish such participation by appellant.

2. The evidence cannot support a finding that the car in which appellant was riding when arrested connected him with the alleged offense.

Appellant was arrested while driving a car, in which Chestnut was a passenger. But there is no evidence that a car was even at the scene of the alleged offense. Witnesses Stays and Tanner testified that they heard a car with a loud muffler after the third person ran out of the vestibule but neither one saw any car (Tr. 39, 182-83, 187).^{3/}

^{3/} The third witness, bellhop Wilson testified that he did not hear "any car or loud muffler or anything like that." (Tr. 240).

The only links between the car which appellant was driving at the time he was subsequently arrested some distance away and the incident at the motel were the muffler and the presence of Chestnut, whom officer Stays identified as the person who ran from the vestibule. No incriminating evidence was found in the car or on the persons of appellant or Chestnut, nor did they (or Young or the juvenile) make any admissions which could connect the car or its occupants with the earlier incident. The two links upon which the Government's case rested were not only the subject of conflicting evidence but were in any event so tenuous as to render the jury's verdict against appellant unsupportable as a matter of law.

It would be stretching circumstantial evidence to absurd limits to allow a jury to conclude that a car can be identified solely by the sound of its muffler. Moreover, the testimony of officer Stays that he heard only the muffler was contradicted by the contemporaneous police radio report which issued a lookout for a 1952 or 1953 red Plymouth bearing Maryland license plates and made no mention of any muffler (Tr. 274-75). The car in which appellant and Chestnut were riding when arrested bore no resemblance to that described in the report (Tr. 103, 200).

3. The evidence cannot support a finding that Chestnut's presence in the car with appellant connected appellant with the alleged offense.

This leaves the presence of Chestnut in the car as the sole incriminating evidence against appellant. But the identification of that

defendant as the third person at the motel was, like that of appellant, wholly inadequate. Tanner testified that Chestnut was not the third participant (Tr. 11). Stays testified that he was (Tr. 181-82), but upon analysis his identification is no more credible than Tanner's. Stays testified that he got a look at the person in the vestibule for "a few seconds" (Tr. 173) and that he was not able to see his face clearly, "only his general description" (Tr. 175). He testified that the person had on a hat with a brim and "maybe a light colored jacket or something" (Id.). But there is no evidence that Chestnut was wearing those or similar articles of clothing when he was arrested or that they were in the car. Nor was there any hat found at the scene (Tr. 177). Stays did not at any time pick Chestnut from a line-up of persons with similar physical characteristics. He claimed that he studied Chestnut's movements at the police station and was thereby able to identify him, but he could not describe even generally what those movements were (Tr. 176-77). In short, Stays' vague identification, based solely on a fleeting glimpse of a person running away from him, cannot constitute sufficient evidence to implicate Chestnut. Moreover, his identification was controverted by the two other eye witnesses (Tr. 11, 236).

4. There is in no event sufficient evidence to support a finding that appellant aided and abetted in the alleged offense.

Even assuming arguendo that the jury could find beyond a reasonable doubt that Chestnut was the person in the vestibule who ran and that appellant drove him away from the scene, there is still not sufficient

evidence to convict appellant of aiding and abetting Chestnut or the others in the offense of housebreaking.

To convict an accused of aiding and abetting in the commission of a criminal offense (D.C. Code §22-105) there must be evidence proving beyond a reasonable doubt that the defendant knew that a crime was being committed^{4/} and that he made some intentional effort at that time to assist the criminal conduct of the principal offender. The principle was stated as follows in Johnson v. United States, 195 F.2d 673, 675-76 (8th Cir. 1952):

The question for determination is whether there was substantial evidence from which the jury might have found beyond a reasonable doubt that defendant aided and abetted in the commission of the crime charged. To be an aider and abetter it must appear that one so far participates in the commission of the crime charged as to be present, actually or constructively, for the purpose of assisting therein . . . Generally speaking, to find one guilty as a principal on the ground that he was an aider and abetter, it must be proven that he shared in the criminal intent of the principal and there must be a community of unlawful purpose at the time the act is committed. As the term "aiding and abetting" implies, it assumes some participation in the criminal act in furtherance of the common design, either before or at the time the criminal act is committed. It implies some conduct of an affirmative nature and mere negative acquiescence is not sufficient. Morel v. United States, 6 Cir., 127 F.2d 827; United States v. Dellaro, 2 Cir. 99 F.2d 781. In fact, it has been held that the mere fact that one is present at the scene of a crime, even though he may be in sympathy with the person committing it, will not render him an aider and abetter.

None of the necessary criteria enumerated in Johnson is supplied by the evidence in this case. There is no evidence that appellant, if

^{4/} Tomlinson v. United States, 68 App. D.C. 106, 93 F.2d 652, 655 (1937) cert.denied, 303 U.S. 646 (1938); Egan v. United States, 52 App. D.C. 384, 287 Fed. 958, 964 (1923).

he was sitting in a car at the time the alleged offense was committed, had any knowledge what Young and the others were doing (assuming arguendo that their conduct was unlawful). And even if he did have knowledge, there is no evidence that he affirmatively participated in the offense either before or at the time it was committed. "[M]ere negative acquiescence is not sufficient" (Johnson supra). The most that could be inferred by the jury^{5/} is that appellant, after the alleged offense was completed, drove Chestnut away from the scene. But that alone is insufficient to make appellant an aider and abettor. The jury's conclusion that he fled the scene with Chestnut cannot by itself support a presumption that he participated in the alleged offense of housebreaking, since, as Chief Judge Bazelon so aptly put it, "flight does not necessarily reflect feelings of guilt and . . . feelings of guilt which are present in many innocent people, do not necessarily reflect actual guilt". Miller v. United States, ___ U.S. App. D.C. ___, 320 F.2d 767, 773 (1963). See also: Wong Sun v. United States, 371 U.S. 471, 483-84 (1963); Cooper v. United States, 94 U.S. App. D.C. 343, 218 F.2d 39, 41 (1954). In the latter case, Judge Prettyman observed that a certain circumstance "is explained by terrorized innocence as well as by a sense of guilt. After all, innocent people caught in a web of circumstances frequently become terror stricken".

Moreover, such ex post facto conduct as driving Chestnut away can-

^{5/} As we have shown, the evidence is not sufficient to sustain such an inference, because of its failure to connect either the car or Chestnut with the motel incident.

not as a matter of law constitute aiding and abetting within the meaning of D.C. Code §22-105. That section 22-105 does not embrace accessories after the fact is clear from its language and from the separate provision relating to such persons in section 22-106.^{6/} Since appellant was not indicted under section 22-106 and since his conviction under section 22-105 cannot stand, a judgment of acquittal for him must be directed (F.R. Crim. P. 29(a)).

II. The absence of sufficient evidence to establish beyond a reasonable doubt appellant as either a principal or as an aider and abettor in the alleged housebreaking requires a judgment of acquittal.

The foregoing establishes, we submit, that the evidence in this case created at the most a suspicion that appellant aided and abetted in the alleged housebreaking. But this Court has many times held that even grave suspicion is not enough to warrant a jury in returning a

6/ Section 22-105 reads:

In prosecutions for any criminal offense all persons advising, inciting, or conniving at the offense, or aiding or abetting the principal offender, shall be charged as principals and not as accessories, the intent of this section being that as to all accessories before the fact the law heretofore applicable in cases of misdemeanor only shall apply to all crimes, whatever the punishment may be. [Emphasis added].

Section 22-106 reads:

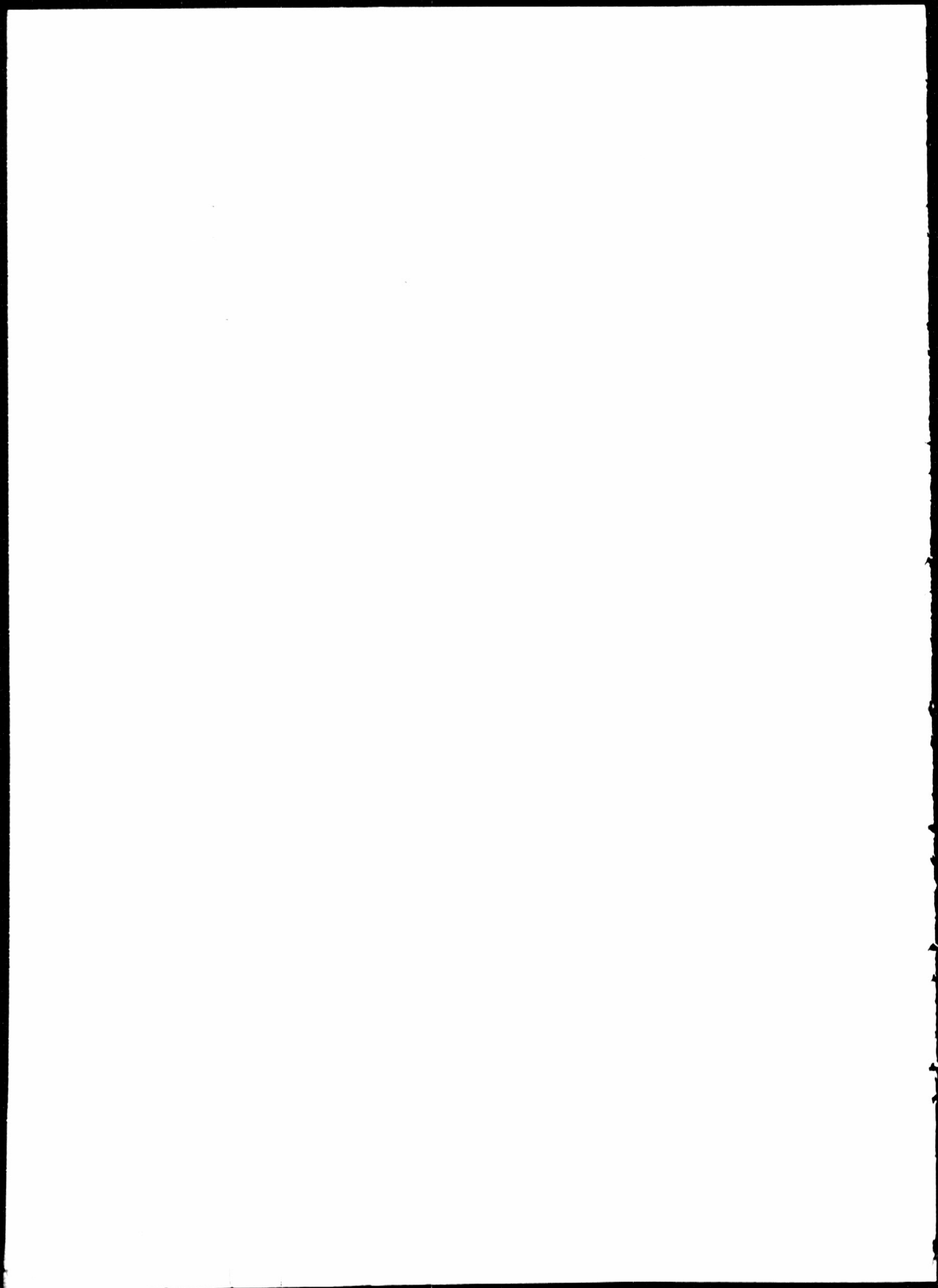
. . . Whoever shall be convicted of being accessory after the fact to any crime punishable by imprisonment shall be punished by a fine or imprisonment, or both, as the case may be, not more than one-half the maximum fine or imprisonment, or both, to which the principal offender may be subjected.

guilty verdict. "Guilt, according to a basic principle in our jurisprudence, must be established beyond a reasonable doubt". Cooper v. United States, 94 U.S. App. D.C. 343, 218 F.2d 39, 42 (1954). Accord: Campbell v. United States, 115 U.S. App. D.C. 30, 316 F.2d 681, 683 (1963); Scott v. United States, 98 U.S. App. D.C. 105, 232 F.2d 362, 364 (1956). In the Campbell case, this Court held that where the defendant was not identified as being at the scene of the crime but was seen elsewhere with a participant following the incident, such evidence was not sufficient to convict him. The Court said (316 F.2d at 683), quoting from Cooper v. United States, supra:

. . . The close association of Simms and Campbell, together with the testimony that they were seen together shortly after the crime, certainly gives rise to a suspicion that Campbell was indeed the unidentified participant with Simms in the robbery. But "[g]uilt, according to a basic principle in our jurisprudence, must be established beyond a reasonable doubt. And, unless that result is possible on the evidence, the judge must not let the jury act; he must not let it act on what would necessarily be only surmise and conjecture, without evidence."

In view of the closely analogous facts in the present case, the same reasoning applies and the jury should not have been permitted to reach a verdict of guilty against appellant.

Under Fed. R. Crim. P. 29(a), the trial court should have granted appellant's motions for entry of a judgment of acquittal of housebreaking. Its failure to do so was erroneous, and the proper course of action for this Court is to reverse the conviction and remand the case with a direction to enter a judgment of acquittal. Cooper v. United States, supra, (218 F.2d at 42); Campbell v. United States, supra (316 F.2d at 683); Scott v. United States, supra (232 F.2d at 364); Middleton v. United States, 106 U.S. App. D.C. 50, 269 F.2d 241 (1959).



CONCLUSION

For the reasons stated, the judgment of conviction of appellant should be reversed and the cause remanded to the District Court with instructions to enter a judgment of acquittal.

Respectfully submitted,

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BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,403

MICHAEL L. STOVALL, APPELLANT,

v.

UNITED STATES OF AMERICA, APPELLEE.

No. 18,404

LESLIE R. YOUNG, APPELLANT,

v.

UNITED STATES OF AMERICA, APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF COLUMBIA

United States Court of Appeals

for the District of Columbia Circuit

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FILED JUN 8 1964

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QUESTIONS PRESENTED

In the opinion of appellee the following questions are presented:

1. Did the District Court err in denying appellant Young's motion to suppress, where:

a. Appellant Young was arrested after he and a juvenile companion entered the lobby of a motel at 3:40 a.m. without luggage and with their right hands in their right coat pockets and a police officer who happened to be in the lobby observed their entrance and believed that they were carrying guns, and further after the officer asked them what they were doing, appellant Young unzipped his trousers and asked for the rest room. The search of appellant Young revealed that he was in fact carrying a gun.

2. Did the District Court abuse his discretion in excluding photographic slides of the motel where:

- a. It was shown that some of the slides were posed pictures of defense counsel standing in a position that appellants believed was the position occupied by the police officer on the morning of the crime.
- b. The slides did not accurately portray the scene of the crime as it existed when the crime occurred.

3. Did the District Court err in denying appellants' motion for a judgment of acquittal where the evidence clearly presented a factual determination for the jury.

INDEX

	Page
Counterstatement of the case.....	1
Government's evidence.....	2
Evidence presented by appellants.....	4
Statutes involved.....	5
Summary of argument.....	6
Argument:	
I. The District Court properly denied appellant Young's motion to suppress.....	8
II. The District Court did not err in refusing to admit certain photographic slides into evidence.....	11
III. The District Court properly denied appellants' motion for judgment of acquittal.....	13
A. The District Court properly denied appellant Young's motion for a judgment of acquittal.....	14
B. The District Court properly denied appellant Stovall's motion for a judgment of acquittal.....	16
Conclusion.....	19

TABLE OF CASES

<i>Bates v. United States</i> , 95 U.S. App. D.C. 57, 219 F.2d 30, cert. denied, 347 U.S. 961 (1955).....	13
<i>Bell v. United States</i> , 102 U.S. App. D.C. 383, 254 F.2d 82 (1958), cert. denied, 358 U.S. 885.....	8, 9
<i>Bell v. United States</i> , 108 U.S. App. D.C. 169, 280 F.2d 717 (1960).....	18
<i>Brennan v. United States</i> , 240 F.2d 253 (8th Cir. 1957), cert. denied, 353 U.S. 931.....	16
<i>Brinegar v. United States</i> , 338 U.S. 160 (1959).....	8
<i>Buie v. State</i> , 217 Miss. 695, 64 S.2d 897 (1953).....	11
<i>Carroll v. United States</i> , 267 U.S. 132 (1925).....	8
<i>Chicago G.W.R. Co. v. Robinson</i> , 101 F.2d 994 (8th Cir. 1939), cert. denied, 307 U.S. 640.....	11
<i>Cooper v. United States</i> , 94 U.S. App. D.C. 343, 218 F.2d 39 (1954).....	13
<i>Coupe v. United States</i> , 72 App. D.C. 86, 113 F.2d 145, cert. denied, 310 U.S. 651 (1940).....	12
<i>Cummings v. United States</i> , 289 F.2d 904 (10th Cir. 1961), cert. denied, 368 U.S. 850.....	15
<i>Curley v. United States</i> , 81 U.S. App. D.C. 389, 160 F.2d 229 cert. denied, 331 U.S. 837 (1947).....	13
<i>DeCamp v. United States</i> , 56 App. D.C. 119, 10 F.2d 984 (1926).....	12
<i>Dixon v. United States</i> , 111 U.S. App. D.C. 305, 296 F.2d 427 (1961).....	8
<i>Drohan v. Standard Oil Co.</i> , 168 F.2d 761 (7th Cir. 1948), cert. denied, 335 U.S. 845.....	11
<i>Edwards v. United States</i> , 78 U.S. App. D.C. 226, 139 F.2d 365 (1943), cert. denied, 321 U.S. 769 (1944).....	16

Cases—Continued

	Page
<i>Ellis v. United States</i> , 105 U.S. App. D.C. 86, 264 F.2d 372 (1959), cert. denied, 359 U.S. 998	8
<i>Fretz v. United States</i> , 78 U.S. App. D.C. 290, 140 F.2d 468 (1944)	18
<i>Glasser v. United States</i> , 315 U.S. 60 (1942)	19
<i>Haggerty v. United States</i> , 5 F.2d 224 (7th Cir. 1925)	18
<i>Harris v. United States</i> , 63 App. D.C. 232, 71 F.2d 532, cert. denied, 293 U.S. 511 (1934)	11
<i>Hicks v. United States</i> , 150 U.S. 442 (1893)	18
<i>Jackson v. United States</i> , 112 U.S. App. D.C. 260, 302 F.2d 194 (1962)	8
<i>Johnson v. United States</i> , 195 F.2d 673 (8th Cir. 1952)	18
<i>Lanham v. United States</i> , 87 U.S. App. D.C. 357, 185 F.2d 435 (1950)	19
<i>Lee v. United States</i> , 37 App. D.C. 442 (1911)	16
<i>Lerine v. United States</i> , 104 U.S. App. D.C. 281, 261 F.2d 747 (1958)	15
<i>Martin v. State</i> , 217 Miss. 506, 64 S.2d 629 (1953)	11
<i>Morton v. United States</i> , 79 U.S. App. D.C. 329, 147 F.2d 28, cert. denied, 324 U.S. 875 (1945)	11
<i>Nye & Nissen v. United States</i> , 336 U.S. 613 (1949)	18
<i>Rezroat v. Com.</i> , 312 Ky. 199, 226 S.W. 2d 949 (1950)	11
<i>Richardson v. Gregory</i> , 108 U.S. App. D.C. 263, 281 F.2d 626 (1960)	11
<i>Roberts v. United States</i> , 109 U.S. App. D.C. 75, 284 F.2d 209 cert. denied, 368 U.S. 863 (1960)	18
<i>Russell v. District of Columbia</i> , (D.C. C.A.) 118 A.2d 519 (1955)	17
<i>Stewart v. United States</i> , 311 F.2d 109 (9th Cir. 1962)	18, 19
<i>Thomas v. United States</i> , 93 U.S. App. D.C. 392, 211 F.2d 45, cert. denied, 347 U.S. 969 (1954)	13
<i>Thompson v. United States</i> , 88 U.S. App. D.C. 235, 188 F.2d 652 (1951)	17
<i>United States v. Brandenburg</i> , 144 F.2d 656 (3d Cir. 1944)	16
<i>United States v. Rabinowitz</i> , 339 U.S. 56 (1950)	8
<i>Weeks v. United States</i> , 232 U.S. 383 (1914)	8
<i>Williams v. United States</i> , 108 U.S. App. D.C. 384, 282 F.2d 867, cert. denied, 365 U.S. 836 (1960)	18
<i>Witters v. United States</i> , 70 App. D.C. 316, 106 F.2d 837 (1939)	16

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,403

MICHAEL L. STOVALL, APPELLANT,

v.

UNITED STATES OF AMERICA, APPELLEE.

No. 18,404

LESLIE R. YOUNG, APPELLANT,

v.

UNITED STATES OF AMERICA, APPELLEE.

*APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF COLUMBIA*

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

In a two-count indictment filed on May 20, 1963, appellant Young was charged with the offense of housebreaking (count 1) and carrying a dangerous weapon (count 2); appellant Stovall was charged only in count 1 with housebreaking (Criminal Case No. 439-63).¹ 22 D.C. Code §§ 1801,

¹ A third defendant, Horace Chestnut was charged and convicted of housebreaking (count 1), but has not appealed his conviction.

3204. A jury trial resulted in a verdict of guilty as charged as to all the defendants. On December 20, 1963, appellant Young was sentenced on count 1 to a term of imprisonment of from one (1) to five (5) years and on count 2 to a term of imprisonment of from five (5) to fifteen (15) months, said sentences to run consecutively. An information was filed by the United States Attorney informing the District Court that on April 5, 1963, appellant Young was convicted of the crime of carrying a dangerous weapon (pistol), that imposition of sentence was suspended and he was placed on probation for a period of one year. Appellant Stovall's sentence was suspended and he was placed on probation for a period of three years. From the judgment and conviction entered below appellants have perfected these appeals.

Government's evidence

On April 19, 1963, Raleigh B. Tanner was the manager of a motel known as the Holiday Inn (Tr. 3) located at 730 Monroe Street, Northeast, in the District of Columbia (Tr. 4).² Officer Stays, a member of the Metropolitan Police Department, was working the twelve (midnight) to eight a.m. shift of duty and assigned to patrol an area that included the Holiday Inn located on Monroe Street (Tr. 105). As was his usual custom when working on that particular tour of duty, Officer Stays would visit the Holiday Inn and briefly converse with the manager. On April 19, 1963, Officer Stays visited the Holiday Inn at approximately 3:30 or 3:40 a.m. (Tr. 3, 106). At this time in the morning the front door of the motel was locked and the manager had to unlock the door to permit the officer to enter the lobby (Tr. 3, 106). Officer Stays then proceeded to the right side of the lobby near the counter and switchboard (Tr. 107). Approximately six minutes after the officer arrived, appellant Young and a juvenile companion entered the motel. The officer knew that any one entering the lobby of the motel would not see him until they had entered the

² In order to facilitate reference to the three transcribed hearings held below, appellee adopts the same form of citation to the transcripts suggested in Appellant Young's Brief at p. 4.

lobby and turned towards him (Tr. 116, 117, 129). This fact was corroborated by Mr. Tanner (Tr. 5).

Appellant Young and his companion entered the lobby with their right hands in their right-hand coat pockets (Tr. 6, 107, 122). Their pockets were bulging and appeared to the police officer to contain a gun (Tr. 120). Appellant Young approached the manager (Tr. 8) and Officer Stays "looked up and saw them, they turned around to [him] as if amazed . . ." (Tr. 116). Officer Stays immediately came towards appellant Young and said "Hey, what is this?" (Tr. 108). As the officer approached Young he saw a third individual fleeing from the first of two sets of doors that lead into the motel lobby (Tr. 109). The juvenile companion then attempted to hide his gun under a couch located in the lobby (Tr. 11, 109). The officer grabbed appellant Young's arm, withdrew it from his pocket and removed a pistol from his pocket (Tr. 108, 109). Young then unzipped his trousers with his left hand and asked for the rest room (Tr. 108, 180).

Shortly after the third individual fled from the outer door of the lobby, both Officer Stays and the manager heard the sound of a loud muffler (Tr. 39, 131). The officer then called into No. 12 Precinct Station, reported the crime and alerted the station to look for a car with a loud muffler (Tr. 110).

Lieutenant Chaney, the officer in charge of No. 12 Precinct Station on April 19, 1963, received Officer Stays' report of the crime and proceeded to the scene (Tr. 89). Approximately one block from the motel, Lieutenant Chaney observed a parked automobile with its rear lights blinking (Tr. 90). As he approached the vehicle it started to move at a rapid rate of speed and he became aware of the fact that the car had a loud muffler (Tr. 97). While pursuing the car he observed that it contained two males and that one climbed from the front seat to the back seat of the automobile (Tr. 91). The car was stopped and two individuals were arrested and taken to the police station. Lieutenant Chaney identified the two individuals as Chestnut and appellant Stovall (Tr. 92), and the car in which they were riding as a Ford Galaxie, tag number SK 622

(Tr. 103). This car was subsequently identified as being registered to a Maude R. Young (Tr. 278). Chestnut and appellant Stovall were then transported to the 12th Precinct Station³ (Tr. 99).

During the trial, Mr. Tanner, the manager of the motel, identified appellant Stovall as the individual who was standing by the outer door of the lobby and who fled upon seeing the police officer (Tr. 11, 48, 79). Officer Stays identified Chestnut as the person he saw standing by the door and who then fled (Tr. 111, 182).

Evidence presented by appellants

The only witness called by the defense was Vernon Shakespeare Wilson, a porter at the motel⁴ (Tr. 235). He testified that he was seated in the lobby of the motel when the alleged crime occurred (Tr. 236). He saw appellant Young and the juvenile enter the motel but did not see a third individual (Tr. 236). He stated that appellant Young immediately asked for the rest room and that the police officer grabbed Young and began to search him (Tr. 236). He did not see the officer remove a gun from Young's pocket (Tr. 237), nor did he see Mr. Tanner's dog chase the third individual who fled⁵ (Tr. 243), or hear a car with a loud muffler (Tr. 240).

³ At the precinct station Chestnut admitted that he was the lookout man for the planned robbery, and appellant Stovall admitted that he was to drive the "get away" car (Preliminary Hearing Tr. 14). The juvenile admitted that they all intended to hold up the motel (Preliminary Hearing Tr. 10). None of the admissions were offered by the Government at trial.

⁴ Neither appellants nor the third defendant, Chestnut testified.

⁵ Mr. Tanner testified that his attention was called to appellant Stovall by his dog chasing him (Tr. 48).

STATUTES INVOLVED

Title 22, District of Columbia Code, Section 1801, provides:

Whoever shall, either in the night or in the daytime, break and enter, or enter without breaking, any dwelling, bank, store, warehouse, shop, stable, or other building, or any apartment or room, whether at the time occupied or not, or any steamboat, canal boat, vessel, or other watercraft, or railroad car, or any yard where any lumber, coal, or other goods or chattels are deposited or kept for the purpose of trade, with intent to break and carry away any part thereof or any fixture or other thing attached to or connected with the same, or to commit any criminal offense, shall be imprisoned for not more than fifteen years.

Title 22, District of Columbia Code, Section 3204, provides:

No person shall within the District of Columbia carry either openly or concealed on or about his person, except in his dwelling house or place of business or on other land possessed by him, a pistol without a license therefor issued as hereinafter provided, or any deadly or dangerous weapon capable of being so concealed. Whoever violates this section shall be punished as provided in section 22-3215, unless the violation occurs after he has been convicted in the District of Columbia of a violation of this section or of a felony, either in the District of Columbia or in another jurisdiction, in which case he shall be sentenced to imprisonment for not more than ten years.

Title 22, District of Columbia Code, Section 105, provides:

In prosecutions for any criminal offense all persons advising, inciting, or conniving at the offense, or aiding or abetting the principal offender, shall be charged as principals and not as accessories, the intent of this section being that as to all accessories before the fact the law heretofore applicable in cases of misdemeanor

only shall apply to all crimes, whatever the punishment may be.

SUMMARY OF ARGUMENT

I

Appellant Young's contention that there was no probable cause for his arrest is without merit. Appellant accompanied by two companions entered a motel at approximately 3:30 a.m. Appellant and one of his companions entered the lobby of the motel with their right hands in their coat pockets. Their pockets were bulging and appeared to the trained eye of a police officer to contain guns. The third companion waited by the outer door of the lobby. A police officer who usually visited the motel on his tour of duty was standing at one end of the lobby. Long curtains that covered part of a glass wall prevented anyone who approached the motel lobby, from seeing the police officer until they actually entered the lobby and turned to face him. When appellant Young and his accomplice saw the officer they registered an expression of amazement. The officer approached appellant and saw the third accomplice flee from the outer door. Seeing the third man flee, the police officer removed appellant's hand from his pocket and took a gun from inside the pocket. These facts justified the District Court's finding that the arrest was based upon probable cause.

II

The trial court did not abuse its discretion by excluding certain photographic slides that were offered to show the physical appearance of the scene of the crime. Whether to admit or exclude photographs is within the sound discretion of the trial judge. In the instant case the trial court found that the slides contained photographs of defense counsel standing where appellants believed the police officer was standing and found further that the pictures did not accurately depict the scene at the time the crime was committed.

III

The trial court did not abuse its discretion in denying appellant Young's motion for a judgment of acquittal. It was undisputed that Young entered the motel lobby. Young contends that he entered for the purpose of finding a rest room; the Government's evidence showed that he entered with the intent to steal. Whether or not appellant Young possessed the requisite criminal intent was a question of fact properly submitted to the jury by the trial court.

Appellant Stovall's contention that the trial court erred in denying his motion for a judgment of acquittal is similarly without merit.

The Government's evidence established that appellant Stovall was either a principal or an aider and abetter in the joint criminal venture. It was shown through the Government's witnesses that four persons participated in the crime. Two individuals, whose identity is not in dispute, actually entered the motel lobby. One individual stood by the outer door of the motel lobby and fled when he saw the police officer, and the fourth individual remained in a car with a loud muffler that was heard leaving the scene of the crime. The testimony of two Government witnesses was in conflict with respect to the identification of appellant Stovall as the accomplice who fled from the motel. However, both Stovall and Chestnut, who was also identified as the accomplice who fled, were apprehended, shortly after the crime was committed, in a car with a loud muffler. Resolving any conflict in the testimony is a function of the jury. The evidence as to appellants' participation in the crime supported the jury verdict.

ARGUMENT

I. The District Court properly denied appellant Young's motion to suppress

(See Tr. 107, 108, 111, 116, 117, 120, 122, 123, 174, 175, 177, 180, 207)

Appellant Young maintains that there was no probable cause for his arrest and that the search of his person, revealing possession of a pistol, was therefore illegal.

If probable cause for an arrest exists, a search of the person conducted incidental thereto is lawful. *United States v. Rabinowitz*, 339 U.S. 56, 63-64 (1950). Evidence found pursuant to such a search can be lawfully seized and is admissible against the accused at trial. *Carroll v. United States*, 267 U.S. 132 (1925); *Weeks v. United States*, 232 U.S. 383 (1914). Thus, if appellant Young was lawfully arrested the gun discovered in his pocket was lawfully seized and admissible at trial.

The threshold question is whether there was probable cause for Young's arrest. "Probable cause exists where 'the facts and circumstances within [the police officer's] knowledge . . . [are] sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed." *Brinegar v. United States*, 338 U.S. 160, 175 (1959). This concept of probable cause involves probabilities and practicalities viewed through the trained eye of a police officer, and not a check list of technicalities. The court must look to the circumstances existing at the moment of arrest, viewed in their entirety. If the circumstances so considered would impress upon the mind of a prudent and cautious police officer a reasonable belief that a crime has been, is being, or is about to be committed, the arrest is lawful. *Jackson v. United States*, 112 U.S. App. D.C. 260, 302 F. 2d 194 (1962); *Dixon v. United States*, 111 U.S. App. D.C. 305, 296 F. 2d 427 (1961); *Ellis v. United States*, 105 U.S. App. D.C. 86, 264, F. 2d 372 (1959), *cert. denied*, 359 U.S. 998; *Bell v. United States*, 102 U.S. App. D.C. 383, 254 F. 2d 82 (1958),

cert. denied, 358 U.S. 885. It is by this standard that appellant Young's arrest must be gauged.

Examining the circumstances involved herein, the record discloses that Officer Stays was standing in the lobby of the Holiday Inn Motel at approximately 3:40 a.m., conversing with the manager of the motel. The officer knew that persons entering the lobby through the front door could not see him until they had entered the lobby (Tr. 116, 117). Without hearing an automobile drive up to the front door, he saw two young men enter the lobby and "I observed their right hands in their right-hand pockets and they were protruding as if they had a gun" (Tr. 120, 107, 122, 123). As the two men walked into the lobby towards the manager, Officer Stays "looked up and saw them, they turned around to me as if amazed. . . ." (Tr. 116). Neither appellant Young nor his juvenile companion carried any luggage.⁶ The officer immediately approached Young and said "Hey what is this?" (Tr. 108). A young man accompanied by a juvenile companion bent solely upon looking for the nearest rest room would not evoke such a reaction from a trained police officer. Upon seeing the police officer the two men registered a look of amazement; certainly, a person making an innocent request would not manifest such a noticeable expression. As Officer Stays moved towards appellant Young he observed a third individual—identified by the officer as Chestnut (Tr. 111)—standing by the outer door of the lobby (Tr. 174). Chestnut's reaction upon seeing the police officer was immediate flight (Tr. 175, 177). At this point Officer Stays grabbed Young's arm, pulling it out of his pocket. Simultaneously, Young unzipped his trousers with his left hand and requested the location of the rest room (Tr. 108, 180). Officer Stays then reached into Young's right-hand pocket and removed a Luger pistol (Tr. 108). Briefly summarizing the circumstances confronting

⁶ Appellant Young asserts that there were "numerous obvious reasons why the boys may have come to the motel lobby office at this hour" (Appellant Young's Br. 9); equally obvious was the fact that they did not appear to the officer to be prospective guests.

the officer we find: (1) two men entering the motel lobby with their right hands in their coat pockets, that were bulging and appeared to a trained eye to contain a gun, (2) the time of day—3:40 a.m., (3) neither men carried any luggage, (4) the look of amazement upon seeing the officer, (5) the flight of the third man who gave the appearance of being a lookout, and (6) the inept act of Young unzipping his trousers in the front lobby of a motel.⁷ Although all of these events occurred within a short space of time (Tr. 207), when viewed in their entirety they were sufficient to establish probable cause for the arrest. Adopting the language of Judge Prettyman in *Bell v. United States*, *supra* at 389, “[p]erhaps no one of these circumstances, taken separately would spell probable cause. We do not say it would. The officer was faced with a combination of circumstances. We must treat the situation as he faced it. We think that under these circumstances a police officer had reasonable grounds for belief that a felony had been committed and that these men had committed it. He had probable cause for arrest.” The record reflects that Officer Stays acted instinctively to protect the lives of the people in the motel lobby, and the facts and circumstances preceding the arrest and subsequent to the arrest support his reaction.⁸ Appellant Young suggests to this Court that a more experienced police officer would have handled the situation differently (Appellant Young’s Br. 9). Without speculating as to the exact procedure appellant Young would have the officer follow, we submit that had Officer Stays not acted when he did, he may have been

⁷ Regardless of the exigency of appellant Young’s condition, his conduct—unzipping his trousers—was more indicative of nimble, ingenious, reasoning by a trapped felon than of an innocent passerby seeking the use of a rest room.

⁸ Even if subsequent facts had shown the officer to have been mistaken, the law recognizes that mistakes in judgment will occur. The law requires that “the mistakes must be those of reasonable men, acting on facts leading sensibly to their conclusions of probability.” *Brinigar v. United States*, *supra* at 176; *Bell v. United States*, *supra*.

effectively foreclosed from obtaining the experience that appellant Young suggests was lacking.

II. The District Court did not err in refusing to admit certain photographic slides into evidence

(See Motion Tr. 29, 34-35, 40, 42, 44, 152-153; and Tr. 156)

Appellant Young maintains that the trial court erred in excluding photographic slides taken by defense counsel three months after the offense (Motion Tr. 29, 34-35).

It is now well settled that the admission or exclusion of photographs in a criminal or civil trial is a matter within the sound discretion of the trial judge, because he is in the best position to determine whether the photographs properly reflect the circumstances sought to be depicted. *Richardson v. Gregory*, 108 U.S. App. D.C. 263, 281 F.2d 626 (1960); *Drohan v. Standard Oil Co.*, 168 F.2d 761 (7th Cir. 1948), *cert. denied*, 335 U.S. 845; *Chicago G.W.R. Co. v. Robinson*, 101 F.2d 994 (8th Cir. 1939), *cert. denied*, 307 U.S. 640.

It is equally well established that if the photographs are shown, by competent testimony, to accurately represent the physical surroundings sought to be depicted, they are admissible. *Morton v. United States*, 79 U.S. App. D.C. 329, 147 F.2d 28, *cert. denied*, 324 U.S. 875 (1945); *Harris v. United States*, 63 App. D.C. 232, 71 F.2d 532, *cert. denied*, 293 U.S. 581 (1934). However, a photograph of a person or object taken for the sole purpose of showing the precise position of a party or to show where some moving or movable object was located at some prior given time, is not competent, because it is self serving and not corroborative. *Rexroat v. Commonwealth*, 312 Ky. 199, 226 S.W.2d 949 (1950); *Martin v. State*, 217 Miss. 506, 64 S.2d 629 (1953); *Buie v. State*, 217 Miss. 695, 64 S.2d 897 (1953). To be relevant as a visual adjunct to oral testimony, the pictures must accurately depict the object at the time of the accident or crime. If they fail in this latter aspect, then they fail as a visual aid to the trier of the facts and are in-

admissible. See *Coupe v. United States*, 72 App. D.C. 86, 89, 113 F.2d 145, *cert. denied*, 310 U.S. 651 (1940); *DeCamp v. United States*, 56 App. D.C. 119, 10 F.2d 984 (1926).

We submit that the photographic slides offered in the instant case did not meet the standards of admissibility set forth above. Instead of presenting the jury with pictures of the motel lobby as it existed at the time of the crime, the evident purpose of the photographs (marked as Defendants' Exhibits 3-12 for identification) was to portray appellants' contention as to the respective positions of the appellant Young and the police officer. In one slide, trial counsel for defendant Chestnut was photographed in the position that the defense believed Officer Stays occupied on April 19, 1963. Officer Stays testified that he was not standing in the posed position (Motion Tr. 40). In another slide the position of the drapes, used to cover a portion of a glass wall, had been changed (Motion Tr. 40). Another slide failed to show the couch located in the lobby (Motion Tr. 40). Another slide taken to show the officer's view did not accurately represent the correct angle of his view (Motion Tr. 42). It became readily apparent in the hearing on the motion to suppress that the slides were self-serving and were not an accurate representation of the motel lobby as it appeared on April 19, 1963. Indeed, the judge who heard the motion to suppress on July 19, 1963,⁹ stated: "I don't think the pictures are helping too much" (Motion Tr. 44). Judge Walsh's comment belies appellant Young's statement that "In the case at bar, the photographs portray the physical conditions exactly as they existed at the time of the alleged crime, except for the easily explained reason for withdrawing the drapes . . ." (Appellant Young's Br. 25).

During the trial, appellant Young sought to introduce the slides in evidence. The trial judge indicated that he would admit the slides if they accurately portrayed the physical appearance of the motel that existed on April 19, 1963 (Tr.

⁹ The motion to suppress was heard and denied by Judge Leonard P. Walsh.

152-153). The Government objected to their admission on the grounds that they were "posed pictures" and further that they did not accurately depict the scene at the time of the alleged crime (Tr. 153). Thereafter the trial court viewed the slides and ruled they were inadmissible. The basis for the court's ruling was:

The slides or photos were posed—taken at a different time of day, different season of the year, with certain alterations of the situation as it existed on the morning of the occurrence—certain curtains were moved back, giving an entirely distorted and inaccurate result, with the opportunity of view entirely changed from what it was at the time of the alleged house-breaking. Explanation necessary to adjust to conform to the existing situation would make for confusion rather than clarity. (Tr. 156.)

In view of the preliminary determination by the trial court that the slides did not accurately represent the scene of the crime, appellant Young's argument that the trial court abused its discretion in excluding the pictures, is without merit.

III. The District Court properly denied appellants' motion for judgment of acquittal

(See Tr. 11, 89, 91, 92, 97, 98, 107, 108, 110, 111, 120, 122, 123, 125, 131, 139, 140, 174, 180, 278)

It is well settled that "upon a motion for a directed verdict, the judge must assume the truth of the Government's evidence and give the Government the benefit of all legitimate inferences to be drawn therefrom." *Curley v. United States*, 81 U.S. App. D.C. 389, 392, 160 F. 2d 229, *cert. denied*, 331 U.S. 837 (1947); *Bates v. United States*, 95 U.S. App. D.C. 57, 219 F. 2d 30, *cert. denied*, 347 U.S. 961 (1955); *Cooper v. United States*, 94 U.S. App. D.C. 343, 218 F. 2d 39 (1954); *Thomas v. United States*, 93 U.S. App. D.C. 392, 211 F. 2d 45, *cert. denied*, 347 U.S. 969 (1954). "The true rule * * * is that a trial judge, in passing upon a

motion for directed verdict of acquittal, must determine whether upon the evidence, giving full play to the right of the jury to determine credibility, weight the evidence, and draw justifiable inferences of fact, a reasonable mind might fairly conclude guilt beyond a reasonable doubt. * * * If he concludes that either of the two results, a reasonable doubt or no reasonable doubt is fairly possible, he must let the jury decide the matter." 81 U.S. App. D.C. at 392-393. "If the evidence reasonably permits a verdict of acquittal or a verdict of guilt, the decision is for the jury to make." 81 U.S. App. D.C. at 397.

The evidence in the instant case was ample to require submission to the jury of Counts 1 and 2¹⁰ against the appellant Young and Count 1 against the appellant Stovall, and was sufficient to support the jury verdict rendered against both appellants.

A. The District Court properly denied appellant Young's motion for a judgment of acquittal.

With respect to appellant Young it is undisputed that he entered the motel lobby at approximately 3:40 a.m. on the morning of April 19, 1963. The sole question presented is whether the Government proved that he entered the motel with the intent to steal. We submit that the evidence fully supports the jury verdict that Young entered the motel with the intent to steal. The record reflects that Young and his juvenile companion entered the motel lobby in the early morning hours of April 19, 1963. A third companion, identified as either Chestnut or Stovall, was observed standing by the outer door of the lobby. Young and his companion entered the lobby with their right hands in their right hand coat pocket (Tr. 107). The pockets were bulging and appeared to contain guns (Tr. 120, 122, 123). By pure happenstance a police officer, whose assigned area included the Holiday Inn motel, happened to be in the motel lobby conversing with the manager. He was standing in a posi-

¹⁰ Appellant Young limits his sufficiency argument to the house-breaking Count. (Appellant Young's Br. 31)

tion that prevented a person entering the lobby from seeing him until such time as the person actually entered the lobby and turned towards him (Tr. 125). Upon seeing the officer, appellant Young registered a look of amazement (Tr. 116). The officer's immediate reaction upon observing Young and his companion was to say "Hey, what is this?" (Tr. 108). Approaching Young, the officer observed a third individual flee from the outer vestibule (Tr. 174). He subsequently identified the third individual as Chestnut (Tr. 111). The officer then grabbed Young's arm, withdrawing it from his pocket, reached into the pocket and removed a Luger pistol (Tr. 108). The manager of the motel then observed that appellant Young's juvenile companion was attempting to hide his gun under a couch located in the lobby (Tr. 11). The police officer then took Young out of the lobby for the purpose of locating the whereabouts of the individual who fled upon seeing the officer. Outside of the lobby the officer heard the sound of an automobile with a loud muffler and saw a car driving over a bridge that passed over the motel (Tr. 131, 139, 140). Officer Stays then called No. 12 Precinct Station and requested that a search be made for an automobile with a loud muffler (Tr. 110).

When the officer removed Young's hand from his pocket, Young immediately, with his left hand, unzipped his trousers and requested the location of the rest room (Tr. 108, 180). Neither Young nor his juvenile companion made any other statement in the motel lobby as to their purpose for entering the motel.

Upon these facts we submit that the jury could find that appellant Young and his companion entered the motel with the criminal intent to steal. Criminal intent is usually a question for the jury that can be inferred from facts and circumstances that reasonably tend to manifest a mental attitude. *Cummings v. United States*, 289 F. 2d 904 (10th Cir. 1961), *cert. denied*, 368 U.S. 850; *Levine v. United States*, 104 U.S. App. D.C. 281, 261 F. 2d 747 (1958). Since criminal intent is a mental state it is rarely susceptible of direct proof and will often depend upon many factors and

may be inferred from outward acts and all the attending circumstances. *Brennan v. United States*, 240 F. 2d 253 (8th Cir. 1957), *cert. denied*, 353 U.S. 931; *cf. Witters v. United States*, 70 App. D.C. 316, 106 F. 2d 837 (1939).

The fact that appellant Young did not actually commit the offense of robbery does not preclude the jury finding him guilty of housebreaking, since the commission of the additional offense is not necessary to complete the crime. *Lee v. United States*, 37 App. D.C. 442 (1911); *United States v. Brandenburg*, 144 F. 2d 656 (3d Cir. 1944). Similarly it was not necessary for the Government to prove that appellant Young committed any overt act with respect to the additional crime. The statute (22 D.C. Code § 1801) proscribes entry with the intent to commit a crime therein, and intent implies only a state of mind. *Witters v. United States*, *supra*.

We believe that the following facts: 1. the time of day; 2. entry into the lobby carrying concealed weapons in their right hands; 3. the look of amazement upon seeing the police officer; 4. the absence of luggage; 5. the flight of the third individual upon seeing the police officer; 6. Young's conduct of unzipping his trousers in the middle of a motel lobby and 7. the juvenile's attempt to hide his gun; when viewed as a total picture, clearly proved beyond a reasonable doubt or at least presented a jury question that appellant Young entered the motel with the criminal intent to steal. See *Edwards v. United States*, 78 U.S. App. D.C. 226, 139 F. 2d 365 (1943), *cert. denied*, 321 U.S. 769 (1944).

B. The District Court properly denied appellant Stovall's motion for a judgment of acquittal.

After Officer Stays arrested Young and his companion he requested No. 12 Precinct Station to conduct a search for an automobile with a loud muffler (Tr. 110). Lieutenant Chaney, the officer in charge of No. 12 Precinct Station on April 19, 1963, received the report from Officer Stays that a crime had been committed at the Holiday Inn (Tr. 89). Lieutenant Chaney responded to the scene of the alleged crime and "was looking for a vehicle with a loud muffler"

(Tr. 89). While traveling in the vicinity of Ninth and Monroe Streets, about one block from the motel, Lieutenant Chaney observed a parked vehicle with its tail lights flashing, (Tr. 97). As he approached the vehicle, it started to move at "a fairly fast rate of speed" (Tr. 98). Lieutenant Chaney pursued the vehicle and detected that it had a loud muffler (Tr. 98). While pursuing the car, Chaney observed two males in the car and he then observed that one of the males climbed from the front seat to the back seat (Tr. 91). At trial, Lieutenant Chaney identified Chestnut and appellant Stovall as the two individuals that he arrested and removed from the car (Tr. 92). Chaney identified the vehicle he stopped as a Ford Galaxie bearing tag number SK 622 (Tr. 103). This vehicle was later identified as being registered to a Maude R. Young (Tr. 278).

At trial Officer Stays identified Chestnut as the individual he saw flee from the outer vestibule of the motel lobby at the time of the offense (Tr. 111). Mr. Tanner the manager of the motel identified appellant Stovall as the third individual that fled from the vestibule (Tr. 11). Appellant argues that this Court should reverse his conviction because of the conflicting identification testimony of Officer Stays and Mr. Tanner.

We submit that under the circumstances of this case the conflicting testimony relating to the identification of the third individual in the motel did not require the District Court to grant appellant Stovall's motion for a judgment of acquittal nor does it require this Court to reverse the conviction. Direct conflicts between the testimony of witnesses, whether they are defense or prosecution witnesses, are to be resolved by the trier of the facts. *Russell v. District of Columbia*, (D.C. C.A.) 118 A.2d 519 (1955). The jury, as the triers of the facts, is charged with the duty of determining the credibility of the witnesses, resolving any conflict in the testimony and accepting or rejecting such parts of the testimony as it sees fit. *Cooper v. United States*, *supra*. It is the jury's function to pass upon the powers of observation of the witnesses. *Thompson v. United States*, 88 U.S. App. D.C. 235, 188 F. 2d 652 (1951), and it

is the jury's function to determine whether or not appellant Stovall was sufficiently identified as a participant in the crime. *Cf. Roberts v. United States*, 109 U.S. App. D.C. 75, 284 F.2d 209, *cert. denied*, 368 U.S. 863 (1960); *Bell v. United States*, 108 U.S. App. D.C. 169, 280 F.2d 717 (1960); *Williams v. United States*, 108 U.S. App. D.C. 384, 282 F.2d 867, *cert. denied*, 365 U.S. 836 (1960).

If the jury believed that appellant Stovall was the third individual to enter the motel and was acting as the lookout for appellant Young and his juvenile companion, then Stovall would be equally responsible with appellant Young. *Fretz v. United States*, 78 U.S. App. D.C. 290, 140 F.2d 468 (1944). If the jury believed that Chestnut was the person who fled from the motel, then they could find from the evidence that appellant Stovall aided and abetted the other three participants by driving the "getaway" car, and was equally responsible with the principals. 22 D.C. Code 105.

Assuming *arguendo*, that the jury found Stovall to be an aider and abetter, clearly, their verdict is supported by the evidence. The record reflects that Stovall was arrested in a car with a loud muffler, one block from the scene of the crime. His driving companion was Chestnut, identified by Officer Stays as the person who fled from the motel. The car in which he was riding was parked until approached by Lieutenant Chaney and then he attempted to drive away at "a fairly fast rate of speed" (Tr. 98). Lieutenant Chaney observed that one of the two individuals in the car climbed from the front to the back seat. We submit that the jury could properly find that appellant Stovall shared in the criminal intent of his three companions and was actively assisting in the perpetration of the crime. *Nye & Nissen v. United States*, 336 U.S. 613 (1949); *Johnson v. United States*, 195 F.2d 673 (8th Cir. 1952). The fact that he was thwarted in performing his assigned task in the criminal venture does not alter his status as an aider and abetter. *Hicks v. United States*, 150 U.S. 442 (1893); *Haggerty v. United States*, 5 F.2d 224 (7th Cir. 1925). The fact that he is charged as a principle does not affect his conviction based upon evidence that he aided and abetted. *Stewart v. United*

States, 311 F.2d 109 (9th Cir. 1962). It is submitted that the evidence tended to show a chain of circumstances from which a jury could reasonably conclude that appellant Stovall was an active participant in the housebreaking. *Cf. Lanham v. United States*, 87 U.S. App. D.C. 357, 185 F.2d 435 (1950).

The jury having returned a verdict of guilty, their verdict must be sustained where there is some evidence to support it taking the view most favorable to the Government. *Glasser v. United States*, 315 U.S. 60, 80 (1942); *Curley v. United States*, *supra*; *Morton v. United States*, 79 U.S. App. D.C. 329, 147 F.2d 28 (1945), *cert. denied*, 324 U.S. 875.

CONCLUSION

Wherefore, it is respectfully submitted that the judgment of the District Court should be affirmed.

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IN THE
UNITED STATES COURT OF APPEALS
For The District Of Columbia Circuit

No. 18,404

LESLIE R. YOUNG, Appellant

Vs.

UNITED STATES OF AMERICA, Appellee

Appeal from The United States District Court
For The District of Columbia

BRIEF FOR APPELLANT

United States Court of Appeals
for the District of Columbia Circuit

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IN THE
UNITED STATES COURT OF APPEALS
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Appeal No. 18,404

LESLIE R. YOUNG, Appellant

Vs;

UNITED STATES OF AMERICA, Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT

STATEMENT OF THE CASE

This is an appeal from the United States District Court for the District of Columbia wherein the appellant, after a trial by jury was found guilty of Housebreaking and carrying a concealed weapon and was sentenced to a term of one to five years and five to fifteen months, respectively, in the penitentiary, said sentences to run consecutively. From this finding and sentence, this appeal is taken.

Briefly stated, the facts of the case are: That at or about 3:40 o'clock A.M. on the morning of April 19, 1963, the appellant, a 21 or 22

year old negro boy, in the company of another negro boy, a juvenile, walked into the lobby-office of the Holiday Inn, 730 Monroe Street, N. E., in the District of Columbia, with his right hand in his coat or jacket pocket which appeared to contain an object causing the pocket to "bulge" (T.R. - 106, 107 and 108); that at the time the lobby-office was fully lighted, was unlocked and open for business (T.R. - 45 and 46), and was occupied by the night manager who was behind the counter, or desk and also by the night bellboy who was sitting on his bench across the room from the manager (T.R. - 12). A uniformed police officer was also in the lobby-office, having stopped in on his rounds for a few minutes' chat with the night manager. As Young and the other boy entered two or three steps into the lobby-office, there appeared to be a third boy who stopped in the vestibule and was still holding the door (T.R. - 109). Young and his juvenile companion walked in about three steps when the police officer, 24-year old Private James L. Stays, of the 12th Precinct, walked over toward Young. At this point, the testimony reveals that three things happened almost simultaneously: (1) Young asked the night bellman if they could use the bathroom (T.R. - 7), (2) the third boy let go of the door and ran out of the vestibule pursued by the night manager's 35-pound dog (T.R. - 47 and 48) and (3) the officer grabbed Young ("yoked him") and pulled an unloaded pistol out of Young's pocket (T.R. - 172 and 173). The officer then went outside to see where the third boy had gone and heard a car with a loud muffler drive away (T.R. - 110). The testimony shows considerable conflict respecting the automobile which the officer saw, or heard,

when he telephoned police headquarters for lookout and for assistance (T.R. - 143 through 148). In any event, two other negro boys were picked up by other police officers in the neighborhood shortly after the incident, and apparently the police related them to said incident.

The preliminary hearing before the United States Commissioner was held on April 30, 1963. A motion to suppress evidence concerning the gun, on the ground that it resulted from an unlawful search and seizure was heard and denied on July 19, 1963. The charges against Young, Stovall and a third boy, Chestnut, were consolidated for trial in the District Court, each being represented by his own attorney.

STATEMENT OF POINTS ON APPEAL

1. The appellant contends that the Trial Court erred in failing to grant the defendant's motion to suppress the evidence respecting the finding of the unloaded gun on the person of the appellant on the grounds that such finding constituted an unlawful search and seizure.

2. That the Trial Court erred in refusing to admit in evidence certain photographic slides (still pictures shown with a projector on a screen) which were offered by the defendant, or, in lieu thereof, grant defendant's motion to allow the jury to visit and view the scene of the alleged crime. For the convenience of the Court of Appeals, photographic prints have been made of four of these slides for consideration in this appeal, defendant's exhibits Nos. 7, 8, 9 and 10.

3. That the Trial Court erred in failing to grant defendant's motion for directed verdict on the grounds of insufficient evidence.

EXPLANATORY NOTE

Official transcripts were made of the testimony in each of the aforementioned proceedings, (1) the Preliminary hearing before the U. S. Commissioner, April 30, 1963, (2) the Motion to Suppress, July 19, 1963 and (3) the trial before a jury, October 31 and November 1 and 4, 1963. Appellant, with the cooperation of counsel for the appellee, has caused the transcripts of each of these three proceedings to be made a part of the record for this appeal. In the interest of brevity, wherever reference is made to the same in this brief, the transcript of testimony at the hearing on the Motion to Suppress will be referred to as (Motion Transcript.) and the transcript of testimony at the trial of the case will be referred to as (Trial Transcript.). The transcript of the testimony before the Commissioner is referred to in these two proceedings.

ARGUMENT

POINT 1

The Trial Court erred in failing to grant defendant's motion to suppress the evidence respecting the finding of the unloaded gun on the person of the appellant on the grounds that such finding

resulted from an unlawful search and seizure.

The appellant respectfully asks this Court to read the following pages of the transcripts:

Motion Transcript - Pages - 22 and 23
- 53
- 68
Trial Transcript - Pages - 7 and 8
- 32
- 45 through 48
- 108
- 127
- 172 and 173
- 198 and 199
- 203
- 239

Appellant claims that at the time he was seized (arrested), and his person searched, that the police officer was without reasonable grounds to believe that a crime had been, or was being, committed and that the appellant was the person who committed it, and, therefore, his arrest and the search of his person which followed was unlawful. What does, or does not, constitute probable cause for the lawful arrest of a citizen, and the resulting search of his person, must be considered from the facts in the possession of the arresting officer up to the moment of arrest and without interpretation thereof aided by mental projection into those facts or information which may have been discovered subsequent to that moment.

We refer to a decision of this Court handed down only a few months ago. In Gatlin vs. United States (in the United States

Court of Appeals for the District of Columbia Circuit, decided December 19, 1963) 326 F.2d 666, the defendant was convicted in the United States District Court for the District of Columbia for robbery. He filed an appeal on the ground that the police officer, at the time of his arrest, did not have sufficient reason to believe that he had committed a robbery, and, therefore, his arrest was unlawful and the evidence which was obtained from the search which followed was inadmissible on the ground that it constituted an unlawful search and seizure.

The information in the hands of the police indicated that at approximately 2 A.M. on November 9, 1962, three men held up and robbed the Old Hickory Restaurant in southeast Washington. That one of the robbers was a negro male, average height and build, and was wearing a trench coat. This information was given to the arresting officer in his police cruiser by radio. A short time later, the officers encountered a cab driver at a filling station and were informed that a negro male of average build, wearing a trench coat had leaped from his cab and disappeared in an area behind the filling station. A search of the area was made to no avail, but the officers, proceeding from the gas station, saw a negro male wearing a trench coat walking down the street. This was about a mile or so from the scene of the robbery. The officer stopped the man (Gatlin), searched him and found a toy gun and approximately

\$50.00 which they took to be part of the "loot" from the robbery. The Court also points out that Gatlin later confessed and implicated another person, one Miller.

Our Court of Appeals in holding that the arrest of Gatlin, and the resulting search and seizure, was without probable cause, in that the police officers were not justified in thinking that he was one of the restaurant robbers, said:

"We treat first the circumstances surrounding the arrest of the defendant Gatlin. In considering the evidence on which the arrest was predicated, we limit ourselves to the testimony of the arresting officer, since the answer to the question of probable cause must in this case be found in the evidence of which he was aware at the time of the arrest."

"Gatlin's arrest was without probable cause.-----
The only evidence on which the arrest was predicated was the fact that there was a robbery, that one of the robbers was a negro wearing a trench coat, that a negro man fled from a taxi, and that Gatlin, a negro man was observed walking down the street a mile and a half from the robbery wearing a trench coat. This is not the type of evidence which would justify deprivation of liberty." (underscore supplied.)

The substantial facts in the case at bar are set out in the beginning of this brief, but are deserving of amplification as to certain testimony relating to the knowledge of the police officer at the time of the arrest. The testimony reveals that when Young entered the motel, there were no menacing, suggestive or directive gestures, and the first and only words which were spoken by him were asking to use the bathroom (Trial Transcript. page 32). The officer

although approaching Young did not suspect anything (Motion Trnsrpt. page 53) until he saw the third boy at the door run, but the boy at the door may very well have been running from the night manager's dog (Trial Trnsrpt. pages 48 and 49). From the officer's testimony (Trial Trnsrpt. page 172), it would not appear that seeing the third boy was, in fact, the reason for grabbing Young, because the officer testified, "When I approached Young and about to grab Young", that is when he saw the third boy, whom he calls Chestnut. From the time Young entered until he was grabbed by the officer, "It was about a split second. I would say less than 30 seconds." (Trial Trnsrpt. pages 172 and 173). The officer further testified that he did not know there was a gun until he pulled it out (Motion Trnsrpt. page 23), and that he did not see any gun until he pulled it out (Trial Trnsrpt. page 127).

What did the officer know at the moment he grabbed Young? (1) That two negro boys walked into the lobby-office of the motel, which was staffed and open for business, without any conduct constituting any disturbance; (2) That they had their right hands in their coat pocket and there was a "bulged" appearance to the pocket. This could have been a pipe and pouch of smoking tobacco, or a flash light, or a folded pair of wool gloves, or many other non-weapon type objects; (3) That the hour was very late at night, or early in the morning, but there were four other people in the motel, on duty and working at this same hour; and (4) That a third boy, if

he in fact had any influence on the officer's action, let go of the door and ran out of the vestibule, being chased by the night manager's dog; (5) From the testimony, the officer had not been advised of the commission of any crime, either at the motel or elsewhere, and had not been given any "lookout for persons" notice from the police department.

Notwithstanding the numerous obvious reasons why the boys may have come to the motel lobby-office at this hour, with nearly every other business place closed, it would seem an inescapable conclusion that Officer Stays' action was designed to discover whether or not these boys had entered the premises for legitimate purposes. While we are confident that Officer Stays is a conscientious young police officer, it must be noted that he is but 24 years of age with only about three years on the police force (Motion Transcript, page 2). Undoubtedly, a more experienced police officer would have handled the situation differently.

It has long been a settled principle of law that a search of the person of a citizen seeking to discover evidence of a suspected crime is a violation of the citizen's constitutional rights, unless such search is based upon the right to make a lawful arrest at the time the search begins. This Court in the recent case of White vs. United States (United States Court of Appeals, District of Columbia Circuit - 1959) 106 U.S. Appls. D. C. 246, in which the facts show that White was walking on the street

in New York City about 2 A.M. on the morning of August 11, 1958, when he was approached by a police officer on routine duty. The particular area was noted as a "hang out" for narcotics peddlers. The defendant was under observance by the police officer for about thirty seconds' time, and while walking, White acted suspiciously and kept looking around as if to see if he was being followed. The officer asked for identification, but the papers produced by White and his statements to the officer conflicted. White said that he had not worked for over a year and supported himself by gambling. The officer then performed a routine "frisking" of White and informed him that he was being arrested for vagrancy. In the process of a more thorough search, Nationwide money orders were discovered, apparently stolen in Washington. In the trial, the defendant was convicted on eleven counts, including forgery, housebreaking, grand larceny and interstate transportation of false securities. The evidence obtained by the search was introduced over defendant's objection. An appeal was taken and the findings reversed. In its opinion, this Court said as follows:

"We have more than once excluded evidence obtained by a search which in truth was not incidental to an arrest, but when in fact the arrest was incidental to a search. Lee v. United States, 98 U.S. App. D.C. 97, 98-99, 232 F.2d 354, 355-56; McKnight v. United States, 87 U.S. App. D.C. 151, 183 F.2d 977. This is such a case. It hardly needs repeating that the strength of the evidence as proof of guilt does not serve retroactively to validate the invalid means by which the evidence was secured, so as to permit its use on the trial of the one whose rights are violated. This has long been settled by the

Supreme Court ----- United States v. Di Re,
332 U.S. 581, 595, 68 S.Ct. 222, 229, 92 L.Ed.
210 ----- and not since questioned. There the Court
said, through Mr. Justice Jackson, 'We have had
frequent occasion to point out that a search is
not to be made legal by what it turns up. In law
it is good or bad when it starts and does not change
character from its success'. (Footnote omitted)".
(underscore supplied)

And this principle adheres to that enunciated by the Supreme Court of the United States. In Henry vs. United States (November 1959), 361 U.S. 98, 80 S.Ct. 168, F.B.I. agents had been informed of a theft of an interstate shipment of liquor. They had received information from the co-defendant's employer implicating the defendant in the liquor theft. The agents had kept Henry and his friend under surveillance for several days, during which time they had trailed the defendants, had seen them loading cartons into a car, apparently having taken them to a tavern. The defendant would then drive back by a circuitous route, to the same alley and loaded more cartons into the car. While in route supposedly to the same tavern, the F.B.I. agents stopped the car. Henry's friend was heard to make a remark to the effect - "Are they the G's - tell them you just picked me up". While standing by the car, the agents observed the cartons inside and saw that they were labelled "Admiral Radio" and were also addressed to an out-of-state addressee. Henry and his friend were arrested and charged with the theft of an interstate shipment of radios.

The Supreme Court, speaking through Mr. Justice Douglas, after reviewing Federal statutes relative to F.B.I. agents, said:

"We turn then to the question whether prudent men in the shoes of these officers would have seen enough to permit them to believe that petitioner was violating or had violated the law. We think not.

When the officers interrupted the two men (stopped their car) and restricted their liberty of movement, the arrest, for purposes of this case, was complete. It is, therefore, necessary to determine whether at or before that time they had reasonable cause to believe that a crime had been committed. The fact that afterwards contraband was discovered is not enough. An arrest is not justified by what the subsequent search discloses, as we said in Johndon vs. United States 333 U.S. 10."

"-----What transpired at or after the time the car was stopped by the officers is, as we have said, irrelevant to the narrow issue before us. To repeat, an arrest is not justified by what the subsequent search discloses. Under our system, suspicion is not enough for an officer to lay hands on a citizen. It is better, so the Fourth Amendment teaches, that the guilty sometimes go free than that citizens be subject to easy arrest."

The law, apparently being well settled on the point, we must look at the facts which existed here as compared with those of other decided cases, to determine whether or not the police officer had reasonable grounds for a lawful arrest. Appellant contends that at the time the officer grabbed him, based upon the meager knowledge possessed by the officer at that time, there was no basis for a lawful arrest. Let us suppose that when the officer searched Young, instead of finding an unloaded pistol, he had pulled out a pipe and full pouch of smoking tobacco. With what

crime would he have been charged? The fact is that both counts of the indictment are founded upon the discovery of the gun. In Gatlin vs. United States, supra, the police officers knew that the crime had been committed, they had a general description of the robbers, which matched with Gatlin's appearance, and he had conducted himself in a suspicious manner. This Court said, however, it was insufficient. Again in the case of White vs. United States, supra, this Court said, in effect, that suspicious conduct is not a grounds for search of a citizen, and recognized that, "---in fact the arrest was incidental to the search". The facts in the case of Henry vs. United States, supra, show far more knowledge, or probable cause, in the F.B.I. agents for an arrest there than has been shown in the case at bar, but the Supreme Court said it was insufficient.

A very recent Connecticut case, decided on the same day that the preliminary hearing was held in the case at bar, April 30, 1963, presents an analogous situation. Although the events which took place were different, they present a situation which is almost identical, in principle, to the case here before the Court, State vs. Collins (Supreme Court of Errors of Conn. - April 30, 1963) 191 A.2d 253. The defendant, Collins, was convicted of breaking and entering and appealed. The Appellate Court set aside the conviction and ordered a new trial. All judges concurred.

On August 8, 1961, at about 2:30 in the morning, in Stamford, Connecticut, two police officers were operating a police cruiser on routine duty. At a given intersection, in an area where no other people or traffic were about at that hour, the officers saw two men (defendant and a companion) standing on the corner, as if to cross the street, and carrying a small canvas bag (presumably a bank type canvas bag). Upon driving past slowly, one of the officers looked back and saw that the defendant was not crossing the street, although there was no obstruction, but that he was watching carefully and intently the progress of the police cruiser as it moved down the street. Later, the defendant crossed and walked down a side street. The officers' suspicion was aroused and they doubled back to where the men had walked and stopped them. The defendant was very nervous and "fidgety". Defendant said that he had been in "trouble with the law" before and couldn't afford it again. Upon inquiry, the men said they were on the street late returning from a crap game and that the canvas bag contained their winnings.

The police officer, suspecting that something was amiss, took the canvas bag from the defendant, looked inside and discovered that it contained an electric razor, some rolls of money and some loose change. Whereupon the two men were taken to police headquarters, where at 8:30 A.M., a robbery was reported and the property in the canvas bag identified.

At the trial, the State claimed that the officers stopped the defendants because of the hour of the morning; they were on the street where no other people or traffic existed; because they suspiciously watched the police cruiser; because of the small canvas bag and because of their conduct when stopped by the officers. In reversing the conviction, and after reviewing the facts, the Court said:

"Amendments IV and XIV Sect. 1 of the Federal Constitution----do not forbid searches and seizures but only unreasonable searches and seizures. While an illegal search must necessarily be an unreasonable one, a search otherwise legal except for the unreasonable way in which it was conducted,----- would still be unreasonable and therefore a violation of the constitutional provisions." (Cases cited).

"If the search of the bag was illegal, then it was unreasonable and the evidence of the contents of the bag was inadmissible. (Cases cited)."

"A properly conducted search incidental to a lawful arrest is not illegal even though made without a warrant. (Cases cited). This rule avails the State nothing, however, since neither party claims that the search of the bag was incidental to any arrest.----- There is no suggestion that the defendant and his companion would have been taken to headquarters but for the officers' observation of the contents of the bag. Especially in view of this fact, the search of the bag obviously was not incidental to any arrest; on the contrary, the sight and the examination of the contents of the bag were a cause of the arrest. This being so, the search and seizure would be, prima facie at least, unlawful." (Cases cited) (underscore supplied).

In a case just decided in the Court of Appeals of Maryland, Braxton vs. State of Maryland (March 3, 1964), 233 Md. - (as yet no page number assigned), the Court reviewed the material facts concerning the arrest and search, and while the conviction was upheld on different grounds, the following language was used regarding arrest on "suspicion, even strong suspicion".

"Judge Prendergast ruled that in view of the facts that (a) the police knew of recent burglaries in the neighborhood and were looking for evidence to help bring the perpetrators to justice, (b) the truck was not of the type to be expected in the area (not bearing the name of any firm or company) and took 'evasive action' without lights when followed, and (c) the occupants of the truck ran away, the police had reason to believe appellant was guilty of one or more of the various felonies they were aware of and were investigating and were justified in making the arrest and the seizures which followed."

"-----Reasonable belief can be based on less than would justify conviction but there must be present more than suspicion, even strong suspicion. Price vs. State, 227 Md. 28, 33.

"It is true flight may be evidence of guilt, although of itself it is not conclusive. The flight in this case would not seem to have had sufficient reasonable relation to any felony of which the officers were aware. As we see them, the facts and circumstances here would not have warranted a reasonably prudent man in believing that the appellant had committed a felony. Edwardsen vs. State, supra; Henry vs. United States, 361 U.S. 98." (underscore supplied)

From the decided cases, it is clear that a search must be incident to a lawful arrest, but a lawful arrest cannot be the result of a search. Neither can the lateness of the hour or "suspicious conduct" be the foundation of a lawful arrest and resulting search of the person. Appellant submits that his arrest resulted from an unlawful search, and, as stated by the Supreme Court of the United States, "a search is not to be made legal by what it turns up". The motion to suppress should have been granted.

POINT 2

The Trial Court erred in refusing to admit in evidence certain photographic slides (still pictures shown with a projector on a screen) which were offered by the defendant, or, in lieu thereof, grant defendant's motion to allow the jury to visit and view the scene of the alleged crime.

With respect to Point 2, the appellant respectfully asks this Court to read the following pages of the transcripts:

Motion Transcript - Pages - 26 through 40

Trial Transcript - Pages - 15
- 33 and 34
- 86 and 87
- 120 through 125
- 162 through 170
- 153 through 156

From the testimony, it is apparent that great and extensive effort was made at the trial to establish a mental picture for the jury of the scene of the alleged crime. In fact, of the 240 pages of the actual testimony in the trial transcript (omitting conferences at the bench and other matters not before the jury), by actual count 74 pages contained testimony attempting to describe various aspects of the Holiday Inn, its lobby-office and entrance way, and what could or could not be seen and from where. Counsel representing the defendant at the trial sought to introduce in evidence 10 photographic slides (to be shown on a screen with a slide projector) which were objected to by the government on the grounds that they were "posed photographs".

Two government witnesses in their testimony gave evidence to the effect that the place where the officer was standing at the counter inside the lobby-office was invisible to anyone entering until after they had gone fully inside the front door of the motel, primarily for the reason that the draperies on the front window were drawn to the point of the "door frame". There was also a mammoth amount of testimony attempting to place the counter in relation to the door, the

vestibule, the drapes and other objects. In fact, on page 268 of the Trial Trnscrip., the Court said, "The record is replete with evidence as to the physical characteristics of the interior, size, the covering of the windows, and outside conditions. It is true it varies according to some of the witnesses (underscore supplied) but it is for the jury to say who in their judgment are to be believed." The record is indeed "replete", but it is inconceivable that any juror could be anything but confused after the attempted descriptions of the government witnesses (Trial Trnscrip. pages 120 through 125 and again pages 162 through 170). Defendant's exhibit #7, however, would leave no doubt in the jury's mind as to what the counter looked like, and the officer could have placed himself therein exactly. The extent of the draperies could have been clearly shown since the drapery rod, which does not extend to the door frame as was claimed by the government witnesses, is clearly shown to stop at the frame of the vestibule and not the frame of the door. Defendant's exhibit #8, shows the doorway entrance and the important part of the lobby and counter, and it can be seen what two or three steps inside would be, and how close this is to the counter. Exhibit #9 shows the vestibule and the inside door, and shows that the door "pulls" open instead of "pushing" open, as the officer testified. Exhibit #10 shows the drapes pulled to their greatest extent, and they do not come to the door frame, as the police officer testified they do. In exhibits 7 and 8, the drapes have been pulled back to expose the extent of the drapery rod itself and to

allow light for the interior photograph, a matter easily explained to the jury. Exhibits 9 and 10 show no departure from the physical makeup of the establishment from that existing at the time of the alleged crime. (Trial Transcript - page 15).

The Court sought to have counsel agree upon the admissibility of these pictures, but government counsel objected to them on the grounds that they were "posed pictures". At this point, although the Court had not viewed the pictures, the objection of the government was sustained (page 153 of the Trial Transcript) apparently for the sole reason that the attorney for one of the defendants (Mr. McCormick) appeared in the pictures. The Court later conducted a hearing in the nature of a voir dire and arrived at the same conclusion.

While the admissibility of pictures in evidence is largely a matter within the discretion of the Trial Court, such discretion should be exercised in such manner as not to deprive the defendant of the right to refute said positive statements made by government witnesses. The admissibility in evidence of pictures in criminal cases is governed by the same rules which apply to civil cases.

20 American Jurisprudence 608 - "SECTION 728 USE IN CRIMINAL PROSECUTIONS - Photographs are admissible in evidence in criminal cases upon the same principles and rules governing their admission in civil cases."

During the trial, counsel sought in vain to provide the jury with a reason to believe that the boys "could have seen" the police officer inside the motel, and, therefore, entered without a criminal intent,

During the trial, Bailey offered extensive testimony concerning the position of the trailer and all other aspects of the area surrounding the trailer as well as the loading dock on which he was painting letters and numbers in accordance with the instructions of his employer. Plaintiff offered in evidence photographs of the area, using a trailer similar to the one which was involved in the accident. The Court of Appeals noted that "these photographs were taken many months after the injury Bailey received", and it must also be noted that a trailer similar to the actual one involved in the accident was used and the scene was reconstructed for the purposes of the photographs. One important point of the photographs offered was to show that Bailey was partially visible above the flatbed trailer.

The Court said:

"These photographs could have had no effect, other than to convey to the jury by visual means the same facts to which Bailey testified in detail. If the words used to describe the location of the trailer before and after the event were competent, then the use of the photographs to supplement the description was not incompetent. Defendant, Greeley General Warehouse Co., could not then be prejudiced by their admission in evidence, for the real test is whether the photographs represent fairly, correctly and accurately the place where the event took place and the conditions surrounding the event."

The matter of using photographs to demonstrate what may or may not be seen from a given point, and also affirming the use of photographs showing a scene about which verbal testimony before the jury is competent, is considered in the case of Davis vs. State (Supreme Court

of Nebr. - 1960) 171 Neb. 333, 106 NW 2d 490. The defendant was convicted of grand larceny and has appealed that conviction. The complaining witness's automobile was robbed of a considerable amount of valuable electrical equipment while it was parked on a street in Omaha, Nebraska, outside of a hotel where the witness had rented a room. The parking place was partly visible from his hotel room window. About 1:30 in the morning, the witness called the police when he saw his car being tampered with, but as the police arrived, the defendant fled in his own automobile which he later smashed and was captured.

During the trial, the State had several photographs of the stolen property admitted into evidence which photographs had been taken at a later date after the stolen property had been returned to the complaining witness. They also had one photograph showing the view from the hotel window admitted in evidence.

"He also argues as error the admission of a picture showing the parking place of the complaining witness's car taken from his hotel window, from which the complaining witness said he could see, in part, his motor vehicle."

"The other pictures objected to are not claimed to be other than accurate reproductions of the things portrayed. While prejudice is claimed, it is not shown."

"The rule repeatedly stated is: A photograph proved to be a true representation of the person, place or thing which it purports to represent is proper evidence of anything of which it is competent and relevant for a witness to give a verbal description."

- Brockman vs. State, 163 Neb. 171 - 79 NW 2d 9."
Judgment of the Trial Court, affirmed.

And it is not necessary that the photographs be a positive and exact duplicate in every detail of the incident or scene in question, but if they are substantially accurate, even though taken at a later date, the weight of authority supports their admission in evidence.

In the case of Streit vs. Kestel (Court of Appeals of Ohio - 1959) 161 NE 2d 409, the Court deals with the question of so-called "posed photographs or pictures". This was an action for damages resulting from an automobile collision at a street intersection which resulted from the defendant swinging his car out and around the corner in a wide circle which he claimed was necessary in order to make the turn. There was admitted into evidence a motion picture showing an experimental automobile making several turns into the same intersecting street to accomplish the same turn which the defendant was required to make, but showing a different method of making the turn from that which the defendant "testified" was necessary. The photographs were admitted by the Court over the defendant's objection.

"It has long been the rule in Ohio that posed photographs are admissible in evidence where they have been properly identified as being fair and accurate representations of conditions as seen by the witness (cases cited)."

"In the instant case we have photographic evidence of experiments (turning from a curb lane into an intersecting street) made out of court which experiments are introduced for the purpose of impeaching the testimony of a witness."

"Testimony relating to experiments made out of the presence of the jury have been admitted in evidence for many years. These experiments must be made under conditions of substantial similarity to the occurrence in issue (cases cited)."

"The first and second paragraphs of the syllabus in the St. Paul Fire & Marine Ins. Co. vs. Baltimore and Ohio R. Co. case (195 N.E. 861, 862) say:

"1. Evidence of experiments performed out of Court, tending to prove or disprove a contention in issue, is admissible if there is a substantially similarity between conditions existing when the experiments are made and those existing at the time of the occurrence in dispute; dissimilarities, when not so marked as to confuse or mislead the jury, go to the weight rather than the admissibility of the evidence.

"An examination of authorities in other jurisdictions establishes the fact that motion pictures, where the ground work has been properly laid, may be admissible in evidence for the purpose of establishing facts relevant to the matters in dispute. (cases cited)."
Judgment affirmed.

It may be pointed out that in the Court's opinion, it required that the conditions be "Substantially similar" (underscore supplied in the Court's opinion) and it will be further noted that the purpose of these photographs was expressly for the purpose of impeaching the testimony of an adverse witness.

Again in People vs. Allen (Supreme Court of Ill. - 1959) 17 Ill. 2d 55, 160 NE 2d 818, the subject of a photograph had been slightly altered before the picture was taken. This was a case in which the defendant was convicted of burglary of a tavern. During the trial the government offered certain photographs in evidence showing the doorway

of the tavern on which the lock had been blown open by a shotgun blast. The tavern owner (Carroll) had painted circles around some of the shot marks.

"As to two of these photographs, the record discloses that defendant's counsel stated that there was no object to these pictures. ----- One of the other photographs in question was a picture of the side door of the tavern showing certain marks where the shotgun pellets had struck the door. Circles had been drawn around some of the shot marks and defendant contends that these circles, which had been placed there by Carroll (the Tavern owner) unduly emphasized the shot marks. An examination of the picture shows that the shot marks are plainly visible thereon, and the fact that several of the marks were circled could not have prejudiced defendant." (underscore supplied)

In the case at bar, the photographs portray the physical conditions exactly as they existed at the time of the alleged crime, except for the easily explained reason for withdrawing the drapes as hereinbefore stated.

Great importance is laid upon the fact that the pictures are so-called "posed". In fact, it appears that the Trial Court had already decided to deny admission of the photographs on this ground before seeing them. So-called "posed" photographs have been admitted in evidence in a variety of cases from many parts of the country. Certainly in the Trial Transcript there was a substantial amount of "posed testimony" (if we may invent a phrase) admitted into evidence at the trial, when the witness stand, the judge, the microphone, the second juror, the jury box, the clerk, the chair, the "white thing",

the court room doors, the lawyer and the juror in the striped dress were all employed, at one time or another as "props" in an effort to describe the scene of the alleged crime. Certainly one individual shown standing in a photograph could not distort the scene which the picture depicts.

In addition to Bailey vs. Greeley General Warehouse Co., supra and Streit vs. Kestel, supra, both of which involved the admission of so-called "posed", or "staged" photographs which were admitted in evidence, in State Courts, we find that the rule is also applied in substantially the same way in the Federal Courts. Chicago Great Western Railroad Co. vs. Robinson (United States Circuit Court of Appeals, Eighth Circuit, March 1939) 101 Fed. 2d 994 which was an action by Robinson against the railroad company for damages sustained as a result of the defendant being run over by a steam engine of the defendant company. Robinson was crossing the railroad track on a foot path, which had been used for many years, and tripped over an iron pipe left by railroad workmen who had been working on the track. He fell, struck his head on the rail and was rendered unconscious lying on the tracks. Defendant's engine had been removed from a train and was proceeding very slowly toward a siding and ran over Robinson inflicting serious injury. There was extensive testimony as to the weather conditions, distance of view and the position of Robinson. Plaintiff introduced in evidence several enlarged

photographs taken from varying distances from the plaintiff in the direction from which the engine approached, and also a motion picture showing the scene, and also showing Robinson lying in the track in a manner similar to that at the time the accident occurred. The Court noted that the pictures were of the same place and that surrounding circumstances were substantially unchanged, although the pictures were taken some time after the accident.

"The enlarged photographs showed the plaintiff lying on the track between the rails at the point where the accident occurred dressed as he was on the day of the injury. They were taken at different distances from points on the track east (the direction of the approach of the engine) of where the plaintiff lay. The moving picture film was taken of the same still object with the camera moving from a distance on the track and approaching plaintiff as he lay between the rails. These were objected to because (among other reasons stated by the Court); and that by the use of the pictures plaintiff was attempting to prove by a set-up what the situation was immediately before the accident." (underscore supplied).

The Trial Court instructed the jury that they, the jury, were the judge of the effectiveness of the pictures. In light of all the testimony, including expert testimony concerning the enlargements, the Court of Appeals then concluded, "We think there was no error in view of the instruction in admitting the photographs in evidence".

Posed photographs were also admitted in the case of Huckabee vs. Montgomery (Supreme Court of Vermont, 1943) 29 A 2d 810 which was a civil action for damages for assault and battery. There was a verdict and judgment for the plaintiff, and the defendant appealed.

In affirming the finding and judgment in the lower Court, the Appellate Court made the following statement with respect to photographs which the plaintiff had introduced in evidence:

"The two photographs, plaintiff's exhibit 5 and 7, were offered for the purpose of showing the plaintiff's position at the time he was struck by the defendant. There was evidence in the case tending to show that the position of the plaintiff as shown by the pictures was practically the same as when the defendant struck him. The photographs were received in connection with that testimony and the jury were correctly instructed as to the use they could properly make of the exhibits. The photographs were properly received in evidence." (cases cited) (underscore supplied).

The law appears to conclude that photographs, whether "posed" or not, are as readily admissible in criminal cases as in civil cases. In addition to Peoole vs. Allen, supra, we call attention to People vs. Clapp, 147 P. 469, (Dist. Court of Appeals of Calif., Rehearing in the Supreme Court of California, denied, 1915) in which the defendant was charged with the murder of one Taylor in the Town of Truckee on June 9, 1914, and was convicted of manslaughter. The defendant was an engineer of a switch engine and the deceased was yard master of the railroad yard. The defendant and deceased lived in the same home and had always enjoyed friendly relations until the day before the crime. As a result of several altercations on the morning of June 9th, the deceased jumped into the cab of the defendant's engine and came at the defendant in a threatening manner.

The defendant shot the deceased in the engine cab and the deceased fell backward from the cab to the ground.

"A photograph was taken of the scene of the homicide showing the engine and tender and the body of a person posed in the position which there was evidence tending to show was the position of the deceased after he fell to the ground. The photograph was admitted as a diagram for the purpose of illustration only, and not as evidence of what in fact occurred." (The Court in affirming the admission of photographs cited five additional cases in support of the point). (underscore supplied).

And also in the case of People vs. Lee 168 P. 694 (a case from the same California Court, rehearing denied by the Supreme Court of California, 1917) in which the defendant was convicted of the murder of one Juck in Stockton, California, by shooting him in the street. In the appeal, Lee claims as error the admission of a photograph of the scene of the crime, taken by the prosecution, with sticks of wood placed so as to show the place where a witness saw the defendant stand and where the decedent fell. In reaffirming its decision in People vs. Clapp, supra, the Court stated:

"Appellant also claims that photographs of the locality of the shooting were improperly admitted in evidence. ----- We think there was no error in the ruling. It comes within the spirit of People vs. Clapp 147 Pac. 469 and cases therein cited. Of course, the photograph was admitted as illustration only, and not as evidence of what in fact occurred."

It must be concluded that photographs showing the physical characteristics of the scene of a crime are properly admissible in

evidence, and they may also be used as an adjunct for the impeachment of damaging and positive testimony given by the government's witnesses. Appellants urge that it should be considered highly unfair to prevent the defendant from showing by photographic evidence that positive and damaging statements by a prosecution witness are, in fact, inaccurate. We do not contend that the police officer made any intentional misstatement of fact, but whether it is intentional or otherwise, the defendant should be allowed to show that it was inaccurate. The extent of the draperies covering the front window at the entrance to the motel is the basis for the "conclusive" statement by the police officer that he "could not be seen", while his conclusion as to the extent of the draperies is, in fact, erroneous.

The appellant strongly urges that, if the pictures were not to be allowed in evidence, then the Court should have granted the defendant's motion to permit the jury to go to the scene and see it for themselves. The testimony of the motel manager (Trial Transcript., Page 15) shows that the physical characteristics of the motel, entrance, lobby, counter and draperies, were the same at the time of the trial as they were on April 19, 1963, even to the extent of the "5' by 6' mapboard" (Trial Transcript., Page 155).

POINT 3

The Trial Court erred in failing to grant defendant's motion for directed verdict on the grounds of insufficient evidence. (at least respecting the charge of housebreaking)

We have hereinbefore called the Court's attention to much of the testimony, and to repeat it here would be redundant. To support a conviction of housebreaking, there must have been some act indicating an intent to commit some other crime after entering the motel. While the mere possession of the unloaded gun is in itself a crime, such a single fact does not, in the absence of some other act, constitute an intent to use the gun. It would not be argued that the mere possession of a weapon type knife, without some overt act to use it, would support a charge of attempted murder. In the case at bar, the boys walked into a place open to the public without any disorder or disturbance, without menacing gestures of any kind, and the only words spoken were to ask to use the bathroom. Appellant says that the evidence is insufficient to support a conviction for the crime of housebreaking, and his motion for directed verdict should have been granted.

CONCLUSION

Appellant urges that both the law and the facts here involved clearly support the conclusion that the Trial Court erred in admitting evidence which should have been excluded, and excluding evidence which should have been admitted. In justice, the conviction should be reversed.

Respectfully submitted,
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